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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 512.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY, AND THE EQUITABLE TRUST COMPANY OF NEW YORK, PETITIONERS,

vs.

NORTHERN SECURITIES COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petition for Certiorari to the United States Circuit Court of Appeals, for the Third Circuit, and Exhibits in Support of Petition of Edward H. Harriman and others to accompany the *United States of America* vs. *The Northern Securities Company* et al.

(19,512.)

(19,612.)

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vs.

NORTHERN SECURITIES COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PROCEEDINGS IN CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA IN THE MATTER OF THE PETITION OF EDWARD H. HARRIMAN AND OTHERS TO INTERVENE IN *The United States of America* vs. *The Northern Securities Company et al.*

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Notice of Presentation.

(Filed April 19, 1904.)

CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF MINNESOTA—THIRD DIVISION.

THE UNITED STATES OF AMERICA,
Complainants,

vs.

THE NORTHERN SECURITIES COMPANY, THE GREAT NORTHERN RAILWAY COMPANY, THE NORTHERN PACIFIC RAILWAY COMPANY, JAMES J. HILL, WILLIAM P. CLOUGH, D. WILLIS JAMES, JOHN S. KENNEDY, J. PIERPONT MORGAN, ROBERT BACON, GEORGE F. BAKER, and DANIEL S. LAMONT,
Defendants.

You will please take notice, that on Tuesday, the twelfth day of April, 1904, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, application will be made in the above entitled suit to the judges of this court, at the United States Circuit Court room in the Post Office Building, in the City of St. Paul, Minnesota, by the undersigned, for leave to file the petition of intervention of Edward H. Harriman, Winslow S. Pierce and the Oregon Short Line Railway Company, verified March 31, 1904, of which a copy is herewith served upon you, and for leave to intervene therein and become parties thereto, and to proceed and be heard upon the subject matter of their petition in respect of the execution of the final decree of this court, entered in this cause on the 9th day of April, 1903, as affirmed by the Supreme Court of the United States, and for such other or further or different order or relief as may be just, equitable and proper, and to the Court may seem meet.

Dated April 2, 1904.

JOHN N. BALDWIN,
Omaha, Nebraska,
Solicitor for said Edward H. Harriman, Winslow S. Pierce and Oregon Short Line Railway Company;

JOHN F. DILLON,
WILLIAM D. GUTHRIE,
R. S. LOVETT,
Of Counsel.

To The Honorable Philander C. Knox,
Attorney-General of the United States.
Honorable C. C. Houpt,
Attorney for the United States for the District of Minnesota;
Honorable John W. Griggs and George B. Young,
Solicitors for defendants Northern Securities Company, James J. Hill, William P. Clough, D. Willis James, John S. Kennedy and George F. Baker;
M. D. Grover, Esq.,
Solicitor for defendant Great Northern Railway Company;
C. W. Bunn, Esq.,
Solicitor for defendant Northern Pacific Railway Company;
Francis Lynde Stetson, Esq.,
Solicitor for defendants J. Pierpont Morgan and Robert Bacon;
David Wilcox, Esq.,
Solicitor for defendant Daniel S. Lamont.

Petition for leave to intervene.

(*Filed April 19, 1904.*)

CIRCUIT COURT OF THE UNITED STATES

For the District of Minnesota,

Third Division.

The United States of America,
Complainant,

v.

The Northern Securities Company, The Great Northern Railway Company, The Northern Pacific Railway Company, James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker and Daniel S. Lamont,
Defendants.

To the Honorable the Judges of the Circuit Court of the United States for the District of Minnesota, Third Division:

The petition of Edward H. Harriman, Winslow S. Pierce and the Oregon Short Line Railroad Company, respectfully shows to this Honorable Court as follows:

I. Your petitioners Harriman and Pierce are now, and ever since November 18, 1901, have been the registered owners and

holders of $82,491,871 par value of the capital stock of the defendant Northern Securities Company, and such holding of stock by them is and was as trustees for the use and benefit of your petitioner, the Oregon Short Line Railroad Company, which company was and still is the beneficial owner thereof.

II. Your petitioner, Oregon Short Line Railroad Company, is a railroad corporation duly organized and existing under the laws of the State of Utah, and heretofore and by indenture dated July 17, 1902, pledged $82,491,000 par value of said stock with The Equitable Trust Company of New York, a corporation organized under the laws of the State of New York, as trustee for an issue of bonds of your said petitioner, of which $82,491,000 face value have been certified and issued; but under the terms of said trust indenture the stock so pledged and standing in the name of your petitioners Harriman and Pierce is available to your petitioners for the purpose of tender, return and restoration of the *status quo* as hereinafter alleged and prayed, which will fully appear by reference to said trust indenture to be produced on the hearing.

III. As your petitioners are advised and verily believe, over ninety-eight and one-half per cent. of the outstanding capital stock of said Northern Securities Company was issued in exchange for shares of the capital stock of the Northern Pacific and Great Northern Railway Companies, respectively, and less than one and one-half per cent. of such stock was issued for other property. They are further informed and verily believe that about $178,284,000 par value of the stock of said Northern Securities Company was issued in exchange for $153,759,425 par value of the stock of the Northern Pacific Railway Company and about $212,600,000 par value of said Securities Company stock was issued in exchange for $118,124,250 par value of the stock of the Great Northern Railway Company.

IV. The said $82,491,871 par value of stock of the Northern Securities Company, now standing in the names of said Harriman and Pierce, trustees as aforesaid, was part of the original issue of the stock of said Northern Securities Company, and was issued directly to them by said Northern Securities Company on or about November 18, 1901, in exchange for $37,023,000 par value of the common stock and $41,085,000 par value of the preferred stock of the Northern Pacific Railway Company; and at the time of such exchange, there was also paid to them by or on behalf of said Securities Company the sum of $8,915,629 in cash. The original certificates so issued to them in November, 1901, are still registered in their names and are now actually in the custody of the said Trust Company as pledgee as aforesaid and available for tender, return and restoration as aforesaid.

V. At the time of such exchange, it was understood and agreed that the said $41,085,000 par value of the said preferred stock should be converted into common stock of said Northern

Pacific Railway Company; and thereupon, after the exchange as aforesaid of said preferred stock for stock of the Northern Securities Company, said preferred stock was converted by said Northern Securities Company into common stock of said Northern Pacific Railway Company of the same par value, and certificates for such new common stock substituted in lieu and place of the certificates for said preferred stock, and the Northern Securities Company now holds all and singular the common stock so originally received from your petitioners and the common stock into which said preferred stock was so converted.

VI. The final decree in the above entitled cause entered in this court on the 9th day of April, 1903, was on Monday, the 14th day of March, 1904, duly affirmed by the Supreme Court of the United States, and in the decision then announced, affirming such decree, it was directed that the judgment of the Supreme Court of the United States should be "that the decree below be and hereby is affirmed, with liberty to the Circuit Court to proceed in the execution of its decree as the circumstances may require."

The mandate upon such decision of the Supreme Court of the United States has not yet issued, and under the rules will not issue until the expiration of thirty days from the date of said decision, unless by special order.

VII. Immediately upon the rendition of such decision by the Supreme Court of the United States so affirming the decree of this court in this cause entered on the 9th of April, 1903, the individual defendants above named and said Northern Securities Company determined, without waiting for the issue of the mandate of the Supreme Court and without any order of this court in execution of its decree, to distribute and divide the stock of the Great Northern and the Northern Pacific Railway Companies held by the Northern Securities Company *pro rata* among the stockholders of said Northern Securities Company according to their holdings of its stock and not to return and retransfer to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said Northern Securities Company originally received from such stockholders in exchange for its own stock, nor to transfer and assign the stock in either of said railway companies to any such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for such stock of said railway companies respectively.

VIII. Upon being informed of such purpose and intention to distribute the stock of the Northern Pacific and Great Northern Railway Companies *pro rata* among the stockholders of the Northern Securities Company, your petitioners submitted the matter to counsel and were advised that there were serious doubts as to the legality of the proposed plan. The fact that they had been so advised was promptly communicated by your

petitioners to the Northern Securities Company, with the request that the meeting of the board of directors of said company, which had been called for March 22, 1904, be adjourned for a few days so as to afford an opportunity for further consideration by your petitioners and their counsel, but such request for adjournment was not granted; and at such meeting, held in the City of New York on said date, notwithstanding said request for an adjournment was submitted, the following preambles and resolutions were adopted, your petitioner Harriman being present as a director of said Northern Securities Company, but declining to vote, viz.:

"WHEREAS, in the course of its business, this Company has acquired, and now holds 1,537,594 shares in the capital stock of the Northern Pacific Railway Company, and 1,181,242 shares in the capital stock of the Great Northern Railway Company; and

WHEREAS, in a suit brought by the United States against this Company, the said railway companies, and others, this Company has been enjoined from voting upon the shares of either of the said railway companies, and each of the said railway companies has been enjoined from paying to this Company any dividends upon any of the shares of such railway company, held by this Company; and

WHEREAS, this Company has issued, and there are now outstanding 3,954,000 shares of its own capital stock; and

WHEREAS, this Company desires and intends to comply with the decree in the said suit, fully, and unreservedly, and without delay;

Resolved, in consideration of the premises, it is declared necessary and desirable for this Company so to reduce its present capital stock as will enable it, without delay, in connection with such reduction, to distribute among its shareholders, the shares of capital stock of said railroad companies held by it.

Resolved, that the Board of Directors of this Company hereby declares it advisable that Article Fourth (4th) of this Company's Certificate of Incorporation be amended, so as to read as follows:

FOURTH: The capital stock of this Company is hereby reduced to three million nine hundred fifty-four thousand dollars ($3,954,000), and shall hereafter be three million nine hundred and fifty-four thousand dollars ($3,954,000), divided into thirty-nine thousand five hundred forty (39,540) shares of one hundred dollars ($100) each. Such reduction of capital stock shall be accomplished by each holder of outstanding shares of this Company's stock surrendering to the Company, for retirement ninety-nine (99) per centum of the shares held by him.

Upon the surrender to this Company, by any shareholder, of the entire number of shares, and parts of shares of this Company's stock, which he is hereby required to surrender, this Company will assign to him, for each share so surrendered, thirty-nine dollars and twenty-seven cents ($39.27) of the stock of the Northern Pacific Railway Company, and thirty dollars and seventeen cents ($30.17) of the preferred stock of the Great Northern Railway Company, and proportional amounts thereof for fractional shares of the stock of this Company.

The Board of Directors or Executive Committee from time to time shall make such rules and regulations as it shall deem necessary or convenient for carrying out the provisions hereof, and all matters pertaining to the surrender and retirement of the stock of this Company, or to the assignment and transfer of the stocks of the said railway companies, hereby contemplated, shall be under the direction of the Board. For the purposes hereof, the stockholders of this Company, and the number of shares held by them, respectively shall be determined from the stock transfer books of the Company, which, for such determination, shall be closed at a day and hour to be determined by resolution of the Board.

Resolved, that a meeting of the stockholders of this Company, for the purpose of taking action upon the said alteration of the Certificate of Incorporation of this Company, and also upon such other business as may come before the meeting, be, and is hereby called, to be held, at the general offices of this Company in the City of Hoboken, County of Hudson, and State of New Jersey, at 11 o'clock A. M., on April 21st, A. D. 1904."

The directors of said Northern Securities Company at said meeting further resolved that a circular or notice should be forthwith sent to the stockholders of the Northern Securities Company explaining in detail the proposed plan of distribution, and thereupon such circular or notice was immediately sent to the stockholders and a copy thereof is hereto annexed as Exhibit "A."

IX. Your petitioners are prepared, able and willing and hereby offer to restore to the said Northern Securities Company all and singular the original certificates for stock of the Securities Company so received by said Harriman and Pierce, and to repay the money paid them by or on behalf of the said Northern Securities Company in such sum as the court shall fix in restoration of the *status quo*, in exchange for and upon the return of the common stock of the Northern Pacific Railway Company so exchanged and the common stock of said railway company representing the preferred stock converted as aforesaid.

X. As your petitioners are informed and verily believe, and, therefore, aver, such plan of distribution so adopted by said

board of directors of the Northern Securities Company, if consummated, would vest a majority of the stock of both the Great Northern and the Northern Pacific Railway Companies in the same individual stockholders of the Great Northern Company who originally co-operated in the promotion and organization of the Northern Securities Company, and who are still cooperating and acting in concert and combination and would continue the common management and direction of said two competing railway companies, and render the decree of this court ineffectual and defeat or evade its true intent and purpose.

Wherefore and forasmuch as your petitioners are without other relief in the premises, your petitioners pray that they be granted leave to file this petition in said suit above entitled and to intervene therein *pro interesse suo* for the protec tion of their rights; that the individual defendants and said Northern Securities Company and each of them be required to make full and true answer in the premises, but not under oath which is hereby expressly waived, and thereupon that your petitioners be permitted in proper time to proceed to a hearing in due form upon proof and upon such notice as may be directed by the court as to all and singular the matters alleged in the above petition.

Your petitioners further pray that it may be ordered and adjudged, in execution of the said final decree of this court so affirmed by the Supreme Court of the United States, that the said Northern Securities Company return and transfer to your petitioners the common stock of the Northern Pacific Railway Company received from them and the common stock of said railway company into which the preferred stock of said company has been converted as aforesaid, in exchange for its own stock, and upon the payment of such sum as the court shall fix in the restoration of the *status quo*.

Your petitioners further pray that, pending the hearing and determination of the manner in which said decree of this court shall be executed, the defendant Northern Securities Company be enjoined and restrained from distributing its present holdings of stock of said Northern Pacific Railway Company under the plan of distribution proposed by it as aforesaid, or otherwise than by return as authorized by said decree, and that your petitioners may have all such other or further or different relief as may be just, equitable and proper.

And as in duty bound, your petitioners will ever pray, etc.

EDWARD H. HARRIMAN.
WINSLOW S. PIERCE.
OREGON SHORT LINE RAILROAD COMPANY,
By EDWARD H. HARRIMAN,
President.

JOHN N. BALDWIN,
Solicitor for Petitioners,
Omaha, Nebraska.

JNO. F. DILLON,
WILLIAM D. GUTHRIE,
R. S. LOVETT,
Of counsel.

UNITED STATES OF AMERICA,
Southern District of New York,
City, County and State of New York, } ss.:

EDWARD H. HARRIMAN and WINSLOW S. PIERCE, being duly sworn, doth, each for himself, depose and say, that he is one of the petitioners named in the foregoing petition, and as such has subscribed the same; that he has read the said petition and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated on information and belief, and that as to those matters he believes it to be true.

EDWARD H. HARRIMAN.
WINSLOW S. PIERCE.

Subscribed and sworn to before me this 31st day of March, 1904.

CHARLES J. HOEHNLE,
[SEAL.] Notary Public,
Kings County.
Certificate filed in N. Y. Co.

(*Exhibit "A" to Intervening Petition.*)

NORTHERN SECURITIES COMPANY.

DIRECTORS.

Robert Bacon,	Daniel S. Lamont,
George F. Baker,	John S. Kennedy,
George C. Clark,	Edward T. Nichols,
William P. Clough,	George W. Perkins,
Edward H. Harriman,	Jacob H. Schiff,
James J. Hill,	James Stillman,
D. Willis James,	Nicholas Terhune,

Samuel Thorne.

26 LIBERTY STREET,
NEW YORK, March 22, 1904.

TO THE STOCKHOLDERS OF THE NORTHERN SECURITIES COMPANY:

Since the formation of your Company with a view of promoting, developing and enlarging the commerce and traffic of the country served by the Great Northern and Northern Pacific Railway Companies, and by the Chicago, Burlington and Quincy Railroad Company, the traffic and earnings of the three railways have largely increased. Rates paid by the public have been materially reduced. The respective railways have been extended and their condition and facilities improved and increased.

The stock of the Northern Securities Company was issued solely for the shares of the Northern Pacific and Great Northern Railway Companies, and other properties purchased by it.

In forming the Company and disposing of its shares, no commissions were paid, nor has the Company incurred any expenses save those necessary for obtaining its charter, and for the economical conduct of its affairs.

The Company's acquisition of Northern Pacific and Great Northern shares was made in the full belief that such purchases were in no wise obnoxious to any law of the United States—an opinion which has received the approval of four Justices of the Supreme Court of the United States, namely, Mr. Chief Justice FULLER, and Associate Justices EDWARD D. WHITE, RUFUS W. PECKHAM and OLIVER WENDELL HOLMES, in the suit brought by the United States against the right of the Company to hold and vote the shares. However, the majority of the Court, disregarding as irrelevant any beneficial increase of commerce, was of the opinion, that as a matter of law your Company's holding of the stocks of the two Railway Companies in itself constituted a restraint of interstate commerce prohibited by the so-called Sherman Act of 1890. Accordingly the Railway Companies have been forbidden to permit your Company to vote or to collect dividends on the shares held by it.

Therefore, your Directors, at a meeting held this day, have, under advice of counsel, decided that in order to fully and promptly comply with the decree in this suit, it is necessary to reduce the capital stock of the Company, and to distribute to its shareholders the shares of stock of said Railway Companies now held by it.

To this end they have adopted resolutions recommending to the stockholders:

First. That the capital stock of this Company be reduced from 3,954,000 shares, now outstanding, to 39,540 shares, being a reduction of 99 per centum.

Second. That said 99 per cent. of the present outstanding shares be called in for surrender and cancellation.

Third. That against each share of the stock of this Company so to be surrendered, there will be delivered

$39.27 stock of the Northern Pacific Railway Company,

$30.17 stock of the Great Northern Railway Company,

and proportionate amounts thereof for each fraction of a share of stock of this Company so to be surrendered.

As required by the laws of the State of New Jersey, under which the Company was created, a special meeting of the shareholders of this Company has been called by the Board of Directors, for Thursday, April 21, 1904, at eleven o'clock in the forenoon, at the office of the Company, 51 Newark Street, Hoboken, N. J., to vote upon said resolutions and upon such other business as may be brought before said meeting.

For the purpose of this meeting, the stock transfer books will be closed April 18, 1904, at three o'clock P. M.

Holders of this Company's stock to a large extent have already expressed their approval of the recommendations of the Board, but the laws of New Jersey require a two-thirds vote of the shareholders to permit the Company to reduce its capital stock. Such vote is the first step necessary for the proposed distribution of the Railway Companies' shares. The collection of the May

and subsequent dividends on such shares being forbidden by the decree until such distribution has been made, the importance of promptly executing and forwarding proxies is obvious.

The assets of the Company remaining in its treasury after the foregoing distribution is made, will consist of stocks and other property in no way involved in the suit, producing income, and conservatively valued at an amount in excess of the $3,954,000, to which it is proposed to reduce the stock of your Company.

Notice of the due approval by the special meeting of the recommendations of the Board of Directors will be immediately published, whereupon, stockholders should deliver their *entire* holdings of stock at this office promptly on and after April 23, 1904. Against such delivery, certificates for the one per centum thereof to be retained by stockholders, will be returned to them, together with amount of stock of each of said railway companies, to which they may become entitled as above, on account of the ninety-nine per centum of their holdings of Northern Securities stock surrendered for cancellation. Fractional parts of shares will be adjusted by the delivery of scrip certificates.

All stock surrendered must be fully executed for transfer, either upon the certificates or upon an attached power of transfer.

By order of the Board of Directors.

Admission of Service of Notice and Petition.

Service of a copy of the within notice and petition is hereby admitted.

ST. PAUL, Minn., April 2, 1904.

CHAS. C. HOUPT,
U. S. Dist. Atty.
M. D. GROVER,
Atty. for G. N. Railway Co.
C. W. BUNN,
Atty. for Northern Pacific Ry. Co.
FRANCIS LYNDE STETSON,
Solicitor for Defts. Morgan and Bacon.
DAVID WILLCOX,
Solicitor for Daniel S. Lamont.

Proofs of Service of Notice and Petition.

STATE OF NEW YORK, }
County of New York, } ss.:

GEORGE E. DOWNS, being by me duly sworn, deposes and says: That he delivered to John W. Griggs, Esq., attorney of record for defendants The Northern Securities Company, James J. Hill, William P. Clough, D. Willis James, John S. Kennedy and George F. Baker, at his office in the City of New York, at about four o'clock P. M. on Monday, April 4, 1904, a true copy of the

above and foregoing notice, and of the petition of intervention of Edward H. Harriman and Winslow S. Pierce, and the Oregon Short Line Railroad Company.

GEO. E. DOWNS.

Subscribed and sworn to before me this 7th day of April, 1904.

CHARLES FRANKLIN,
Notary Public,
New York County.

[NOTARIAL SEAL.]

BEFORE ME, the undersigned authority, personally appeared David A. Chambers, who after being by me duly sworn on oath deposed that he delivered to the Honorable Henry M. Hoyt, Solicitor-General of the United States, in Washington, D. C., at 3.15 o'clock P.M., April 5, 1904, a true copy of the above and foregoing Notice, and of the Petition of Intervention of Edward H. Harriman, Winslow S. Pierce and the Oregon Short Line Railroad Company, verified March 31, 1904, in the above entitled suit; and that the Honorable Philander C. Knox, Attorney-General of the United States, was absent from Washington, D. C., this Fifth day of April, 1904.

DAVID A. CHAMBERS.

Subscribed and sworn to before me this 5th day of April, 1904.

EDWIN S. CLARKSON,
Notary Public,
District of Columbia.

[NOTARIAL SEAL.]

Affidavit of Edward T. Nichols.

(*Filed April 19, 1904.*)

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF MINNESOTA.

UNITED STATES OF AMERICA, Plaintiff, AGAINST NORTHERN SECURITIES COMPANY and others, Defendants.	Affidavit of Edward T. Nichols. 9 April, 1904.

IN RE APPLICATION OF EDWARD H. HARRIMAN AND WINSLOW S. PIERCE FOR LEAVE TO INTERVENE.

STATE OF NEW YORK,
City and County of New York, } ss.:

I, WILLIAM H. BRUDER, a Notary Public in and for the State and County aforesaid, do hereby certify that on the ninth day of April, A. D. 1904, at said State and County, Edward T. Nichols came before me in person, and having been by me first duly sworn, did depose and say:

I am 51 years of age, and reside at Morristown in the State of New Jersey. Continuously since November 14, 1901, I have been and now am Secretary and Treasurer of the Northern Securities Company, and in those capacities I have continuously had charge and supervision of its records and accounts.

I am well acquainted with the evidence taken in the said suit, and I know all the individual defendants in said suit and all the persons referred to in said evidence as those consulted about the formation of the Northern Securities Company; they do not exceed ten or twelve persons altogether.

The individual defendants in said suit and all the other holders of stock of the Great Northern Railway Company, or of the Northern Pacific Railway Company, referred to in said evidence as having been consulted about the formation of the Northern Securities Company, now hold altogether nine hundred ninety-six thousand and sixteen (996,016) shares in the stock of the Northern Securities Company. The aggregate of their holdings upon the ratable distribution proposed by the Board of Directors of the Northern Securities Company would be: of the stock of the Northern Pacific Railway Company, three hundred eighty seven thousand two hundred and twenty-four (387,224) shares, being twenty-four and nine-tenths (24.9) per cent of the whole stock of that company: and of the stock of the Great Northern Railway Company, two hundred and ninety-seven thousand four hundred and ninety-three (297,493) shares, being twenty-three and eight-tenths (23.8) per cent of the whole stock of that company.

Excluding the eight hundred twenty-four thousand nine hundred eighteen and 71/100ths (824,918.71) shares of the Northern Securities Company standing on the books of that company in the names of Edward H. Harriman and Winslow S. Pierce, the holdings of the fifty-eight (58) next largest stockholders of that company would have to be aggregated to form a majority of the stock of that company. The total aggregate holdings of the said fifty-eight (58) next largest holders of that stock are two million, one thousand, five hundred and eighty-one (2,001,581) shares. The aggregate of their holdings of the stock of the Northern Pacific Railway Company under the plan of ratable distribution proposed by said Board of Directors would be seven hundred seventy-eight thousand one hundred and sixty one (778,161) shares.

Excluding the ratable proportion of the stock of the Great Northern Railway Company that Messrs. Harriman and Pierce would receive under the plan of distribution proposed by said Board, the ratable portion of this last mentioned stock that would be received by the seventy-two (72) next largest holders of stock of the Northern Securities Company would have to be aggregated to make a majority of the stock of the Great Northern Railway Company. The ratable portion of the stock of the Northern Pacific Railway Company that would be

received by Messrs. Harriman and Pierce under the said proposed plan of distribution, added to the aggregate of the ratable portion of said stock that would be received by the individual defendants, and all others who were consulted as to the formation of the Northern Securities Company, would amount to forty-five and sixty-seven one-hundredths (45.67) per cent of all the stock of the Northern Pacific Railway Company.

The portion of the stock of the Great Northern Railway Company that would be received by Messrs. Harriman and Pierce under the said proposed plan of ratable distribution, added to the aggregate of the ratable portion of said stock that would be received by the individual defendants, and all others who were consulted as to the formation of the Northern Securities Company, would amount to forty-three and one-half (43½) per cent of all the stock of the Great Northern Railway Company.

SECOND.

Referring, specifically to the petition filed herein, March 31, 1904, though involving some repetition, I further depose and say as follows:

It is not true, as alleged in Article X. of the petition, that the plan of distribution adopted by the Board of Directors of the Northern Securities Company, if consummated, would vest a majority of the stock of both the Great Northern and the Northern Pacific Railway Companies in the same individual stockholders of the Great Northern Company who originally co-operated in the promotion and organization of the Northern Securities Company; it is not true that such parties are still co-operating or acting in concert, excepting that they are all supporting the plan of ratable distribution adopted by the Board of Directors of the Northern Securities Company; and it is not true that the plan of distribution adopted by the Board of Directors would continue the common management and direction of said two competing railway companies and render the decree of the Court ineffectual, and defeat or evade its true intent or purpose. But, on the contrary thereof, it is true that the necessary effect and result of granting the said petition of Harriman and Pierce would be to vest in the Union Pacific Railway Company, owner of substantially all the stock of the Oregon Short Line Railroad Company, of both of which companies the said Harriman is President, the control of the Northern Pacific Railway Company and of the Chicago, Burlington and Quincy Railroad Company, which two railroads are keenly competitive with the railroad of either the Union Pacific Railway Company or the Oregon Short Line Railroad Company, as is stated in the petition of the United States filed herein March 10, 1902, and as is shown by the testimony herein; and such common control would be contrary to and forbidden by the constitutions and laws of other States in which such railroads or some part thereof are situated and are operated.

The facts and the results of such common ownership are as follows:

Every person (other than the persons interested in the Union Pacific Railway Company) named or referred to in the said petition of the United States filed herein March 2, 1902, or in the opinion or decree of the Circuit Court or of the Supreme Court herein, as an original or co-operating stockholder of either the Great Northern Railway Company (including the holders of the 300,000 shares of the capital stock of the Great Northern Railway Company, specifically referred to in the opinion of Judge Thayer as having been originally acquired by the Northern Securities Company) or of the Northern Pacific Railway Company, is included in the following list: Robert Bacon, George F. Baker, James J. Hill, D. Willis James, John S. Kennedy, Daniel S. Lamont, Lord Mount Stephen, Lord Strathcona, Samuel Thorne, J. P. Morgan, J. P. Morgan & Co., William P. Clough, who now own in the aggregate 996,016 shares of the stock of the Northern Securities Company.

The result of the ratable distribution proposed would be to vest in the individuals above named 387,224 shares or $24\frac{9}{10}$ per cent of the capital stock of the Northern Pacific Railway Company, and 297,493 shares or $23\frac{8}{10}$ per cent of the capital stock of the Great Northern Railway Company, being about one-fourth of each company.

The result of the ratable distribution above proposed would be to vest in the Oregon Short Line Railroad Company 320,706 shares, or 20.69 per cent of the capital stock of the Northern Pacific Railway Company and 246,389 shares, or 19.71 per cent of the capital stock of the Great Northern Railway Company, being about one-fifth of each company.

The result of the ratable distribution above proposed would be to vest in about 3,000 persons, scattered over the face of the world, without any relation to each other, 1,229,294 shares or 79.31 per cent. of the capital stock of the Northern Pacific Railway Company and 993,578 shares or 79.4 per cent. of the capital stock of the Great Northern Railway Company, being more than a majority of both companies.

Thus the effect of the ratable distribution proposed by the Board of Directors would be to scatter and distribute the majority of the stock of each company among more than 2,500 different holders, while the granting of the petition of Harriman and Pierce would be to concentrate and vest in the competitive Union Pacific Railway System the absolute control of the Northern Pacific Railway Company.

THIRD.

From the organization of the Northern Securities Company to close of business on April 5th, 1904, eighty-five thousand nine hundred and nine (85,909) certificates of stock of that company have been issued and delivered to stockholders therein. During

the same period approximately sixteen thousand (16,000) transfers of the stock of the Northern Securities Company have been made by the holders thereof and have been registered upon the stock transfer books of the said company.

During the same period approximately three thousand one hundred (3,100) separate stock accounts with stockholders of the Northern Securities Company have been opened upon the stock books of that company, of which approximately twenty-six hundred (2,600) accounts remain open, representing an equal number of separate holdings of said stock at this date.

The stock of the Northern Securities Company has been issued for the following named purposes and for the following named considerations:

1. For cash, at par to the incorporators.
2. In payment for Northern Pacific original common stock.
3. In payment for Northern Pacific preferred stock.
4. In payment for Northern Pacific new common stock.
5. For cash in the open market, the proceeds being used in the purchase, for cash, of Great Northern stock and other stocks now held by the Northern Securities Company.

Of the stock of the Northern Securities Company issued and transferred in payment by that company for stocks of the Northern Pacific Railway Company and the Great Northern Railway Company large amounts have been sold and transferred by the original holders to others, and have since been traded in on the markets and in private transactions, and have undoubtedly passed through many thousand separate ownerships, so that now it would be impossible to determine with any reasonable accuracy what Northern Pacific or Great Northern stock formed the original consideration for any one of many thousand of the present outstanding certificates of stock of the Northern Securities Company.

For example, in very many instances the same persons sold to the Northern Securities Company both Northern Pacific and Great Northern stock in unequal amounts, and received therefor certificates for the stock of the Northern Securities Company which had for their consideration the sales of both railway stocks. The original holders of these certificates afterward sold parts of their Northern Securities stock, and those parts were again divided and subdivided in subsequent dealings. In sundry instances, a certificate representing a sale of both Northern Pacific and Great Northern stock to the Northern Securities Company would be surrendered to the latter, together with other certificates coming from other sources and originally issued for other considerations, and a new certificate or certificates be issued, representing a consolidation of all the previous certificates surrendered. After this the last named certificates would be subdivided by sales on the market and new certificates be again issued.

For about twenty-five years last passed I have continuously

been an officer, in the City of New York, of railway and other corporations, all said time having in charge the keeping of the records and accounts of stock transfers and the issuance of stock certificates, and I am familiar with all details of that class of work; and I feel sure it would be absolutely impossible now to ascertain the specific number of shares of stock of the Northern Pacific Railway Company or of the Great Northern Railway Company, represented by any one of a very large proportion of the present outstanding certificates of stock in the Northern Securities Company.

EDW'D T. NICHOLS.

Subscribed and sworn to before me this 9th day of April, 1904.

WM. H. BRUDER,
Notary Public,
New York County.

[SEAL.]

Affidavit of James J. Hill.

(*Filed April 19, 1904.*)

CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF MINNESOTA,

Third Division.

THE UNITED STATES OF AMERICA,
Complainant,

vs.

NORTHERN SECURITIES COMPANY, THE GREAT NORTHERN RAILWAY COMPANY, THE NORTHERN PACIFIC RAILWAY COMPANY, JAMES J. HILL, WILLIAM P. CLOUGH, D. WILLIS JAMES, JOHN S. KENNEDY, J. PIERPONT MORGAN, ROBERT BACON, GEORGE F. BAKER and DANIEL S. LAMONT,
Defendants.

STATE OF MINNESOTA, County of Ramsey, } ss.:

JAMES J. HILL, being duly sworn, says: That he is president of the Northern Securities Company, and that, as shown by its books, the stock of said Company has been issued and is now outstanding as follows:

There have been issued and now are outstanding certificates for 3,954,000 shares (each of the par value of $100) of the capital stock of the Northern Securities Company, which certificates (besides $45,332,236.50 in cash) were issued and paid as follows, viz.:

(*a.*) 1,768,229 shares (and $43,625,036.50 in cash) for 1,537,594 shares (each of the par value of $100) of the common stock, and

410,850 shares of the preferred stock of the Northern Pacific Railway Company, which preferred stock was delivered and transferred to the Northern Pacific Railway Company in consideration of and exchange for $41,085 cash received therefor by the Northern Securities Company, with the knowledge and assent of the said Edward H. Harriman;

(*b.*) 2,110,576 shares (and $1,707,200 in cash) for 1,181,242 shares (each of the par value of $100) of the capital stock of the Great Northern Railway Company;

(*c.*) 75,220 shares to the public for cash used for the purchase of other property, and for corporate purposes.

JAS. J. HILL.

Subscribed and sworn to before me this 11th day of April, 1904.

A. J. DIXON,
Notary Public,
Ramsey County, Minnesota.

[NOTARIAL SEAL.]

Verified Minutes Northern Pacific Railway Company.
(Filed April 19, 1904.)

CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF MINNESOTA.

Third Division.

THE UNITED STATES OF AMERICA,
Complainants,

vs.

THE NORTHERN SECURITIES COMPANY, THE GREAT NORTHERN RAILWAY COMPANY, THE NORTHERN PACIFIC RAILWAY COMPANY, JAMES J. HILL, WILLIAM P. CLOUGH, D. WILLIS JAMES, JOHN S. KENNEDY, J. PIERPONT MORGAN, ROBERT BACON, GEORGE F. BAKER and DANIEL S. LAMONT,
Defendants.

STATE OF NEW YORK,
City and County of New York, } ss.:

GEORGE H. EARL, being duly sworn, deposes and says:

I am Secretary of the Northern Pacific Railway Company, one of the defendants in this suit, and have been Secretary of said Company continuously from November, 1901. During that time I have regularly attended the meetings of the Board of Directors, and of the Executive Committee of said Company, and have kept and have entered accurate minutes of the proceedings of all such meetings in books belonging to the Company, which during all such period have been and now are in my custody in

the office of the Company in the City of New York. I have made a true copy of all such minutes from November 13, 1901, as relate to the retirement of the preferred stock and the issue of common stock, and have annexed the same hereto as part of my deposition. All action therein recorded was taken as therein stated, and by the affirmative vote of every Director therein recorded as having been present at the meeting at which such action was taken, and in every instance every Director so recorded as present at any meeting was so present, and voted in favor of every resolution in said minutes recorded as having been adopted at such meeting.

GEO. H. EARL.

Subscribed and sworn to before me, in the City of New York, this 7th day of April, 1904.

WM. H. BRUDER,
[SEAL.] Notary Public,
New York County.

(*Northern Pacific Railway Company. Directors' Eighty-third Meeting. November 13, 1901.*)

At a meeting of the Board of Directors held pursuant to due notice at the office of the Company, No. 49 Wall Street, New York City, on Wednesday, November 13, 1901, at 2 o'clock P. M., there were present the following newly elected Directors (constituting a quorum), viz.:

Messrs. Baker,
HARRIMAN,
Hill,
Ives,
James,
Kennedy,
Lamont,
Mellen,
Rea,
Rockefeller,
Steele,
Stillman,
Thomas,
Twombly.

On motion, Mr. Ives was chosen to act as Chairman. He thereupon took the chair and announced the meeting ready for organization.

The Secretary then submitted the report of the Inspectors of Election, showing that at the annual meeting of Stockholders held on October 1, 1901, the following were elected Directors for the ensuing year, to wit:

Robert Bacon,
George F. Baker,

EDWARD H. HARRIMAN,
James J. Hill,
Brayton Ives,
D. Willis James,
John S. Kennedy,
Daniel S. Lamont.
Charles S. Mellen,
Samuel Rea,
William Rockefeller,
Charles Steele,
James Stillman,
Eben B. Thomas,
Hamilton McK. Twombly.

The Directors then proceeded to the election of officers.

On motion it was

Resolved: That the Secretary be, and hereby he is, directed to cast a ballot in favor of the election of the following named persons to serve as officers of this Company for the ensuing year, to wit:

For President.....Charles S. Mellen,
For Vice-President.....Daniel S. Lamont,
For Comptroller.....Henry A. Gray,
For Treasurer.....Charles A. Clark,
For Secretary and Assistant Treasurer..George H. Earl,
For Assistant Secretary.....Richard H. Relf,
For General Counsel in New York.....Francis Lynde Stetson,
For General Counsel in St. Paul.....Charles W. Bunn.

The Secretary cast the ballot as directed, and the Chairman announced that the above named persons were duly elected to the offices set opposite their names respectively.

Mr. Ives then resigned the chair in favor of Mr. Mellen.

The resignation of Mr. Robert Bacon as a Director of this Company was presented, and, on motion, the same was accepted.

Mr. Samuel Spencer was nominated as a Director to fill the vacancy caused by the resignation of Mr. Bacon, and on motion, the Secretary was directed to cast a ballot in favor of the election of Mr. Spencer. This was done and the Chairman announced that Mr. Samuel Spencer had been duly elected a Director of this Company to fill the existing vacancy.

On motion of Mr. Steele, it was

Resolved, That the following Directors be and hereby they are appointed as the Executive Committee of this Company, viz.: Messrs. Baker, HARRIMAN, Hill, Kennedy, Spencer and The President, or in his absence The Vice-President, *ex-officio*.

The following preamble and resolutions offered by Mr. Kennedy and seconded by Mr. Baker, WERE UNANIMOUSLY ADOPTED:

WHEREAS, Under and pursuant to an agreement dated, July 13, 1896, the Northern Pacific Railway Company did acquire from Messrs. J. P. Morgan & Co. a copartnership in the City of New York (in said agreement called the Reorganization

Managers), certain stocks, bonds and other property representing the system formerly of the Northern Pacific Railroad Company, and in consideration of such agreement and transfer did issue and deliver to the Reorganization Managers certificates for 750,000 shares of its fully-paid and non-assessable preferred stock and 800,000 shares of its fully-paid and non-assessable common stock, of the character described in a certain plan and agreement for the reorganization of the Northern Pacific Railroad System, dated March 16, 1896; and, furthermore, did agree at all times and in all ways and particulars to coöperate with the Reorganization Managers and to assist them in carrying into effect and in accomplishing the purposes of said plan and agreement of reorganization; and

WHEREAS, In and by the said plan and agreement of reorganization it was expressly provided that the right would be reserved by the new company (being the Northern Pacific Railway Company) to retire this preferred stock in whole or in part at par from time to time upon any first day of January during the twenty years succeeding the date of said reorganization agreement; it being the purpose and the intent of the said agreement that the ultimate control of the new company should be held and be exercised by the holders of the common stock, and that the preferred stock should as soon as practicable, be liquidated and be paid off in cash at par; and

WHEREAS, Upon the first day of July, 1896, at a meeting of the stockholders of the Northern Pacific Railway Company, each and every stockholder being present and voting in favor thereof, a resolution was duly adopted providing for the issue of $80,000,000 of common stock and of $75,000,000 of preferred stock of the Northern Pacific Railway Company, and expressly prescribing that such preferred stock should be issued upon the condition that at its option the Company might retire the same in whole or in part, at par, from time to time, upon any first day of January prior to 1917; and

WHEREAS, At a meeting of the Directors of the Northern Pacific Railway Company, duly held on the 8th day of July, 1896, a form of certificate for the preferred stock of the Company, with the conditions and regulations to be incorporated therein or endorsed thereon, was duly adopted by the unanimous vote of the Board of Directors of the Northern Pacific Railway Company, including the following provision:

> "The Company shall have the right at its option, and in such manner as it shall determine, to retire the preferred stock in whole or in part, at par, from time to time on any first day of January prior to 1917;" and

WHEREAS, At a meeting of the stockholders of the Northern Pacific Railway Company, duly held upon July 13, 1896, the said resolution of the Board of Directors adopting the said form of stock certificate to be issued for the preferred stock

was duly ratified and approved by the affirmative vote of every stockholder of the Company; and

WHEREAS, Each and every certificate for the $75,000,000 of preferred stock of the Northern Pacific Railway Company, containing the express provision for the retirement thereof, from time to time thereafter was issued under and pursuant to the provisions of the said resolution of July 1, 1896, and each and every certificate for stock now outstanding contains such express provision for the retirement thereof; and

WHEREAS, Under and pursuant to Section 8 of the Act, Chapter 244 of the Private and Local Laws of Wisconsin, approved April 15, 1895, it was expressly provided that all the affairs of this Company should be managed by a Board of Directors who should be stockholders, and who thereby were invested with all the powers of the corporation save as thereinafter provided; and

WHEREAS, In and by Section 11 and Section 12 of the said Act, Chapter 244 of the Laws of 1895, it was expressly provided that this Company might make its preferred stock convertible into common stock upon such terms and conditions as should be fixed by the Board of Directors, and that it might in its corporate name execute and deliver its notes, bonds, debentures or other evidences of indebtedness in such form as from time to time should be prescribed by the Board of Directors, and in such amount as should be deemed from time to time by said Board expedient, and might make the same convertible into its capital stock of any class upon such terms and conditions as to the Board of Directors might seem advisable; and

WHEREAS, The holders of a majority of the common stock of the Northern Pacific Railway Company have requested the Board of Directors to take all such action as may be requisite to retire the whole of the preferred stock upon the First day of January, 1902, and have given satisfactory assurances that the necessary moneys for that purpose will be furnished, and that all action requisite for that purpose will be taken by the holders of the common stock; and

WHEREAS, In the judgment of the Board of Directors of the Northern Pacific Railway Company, it is desirable that this Company should now exercise the option to retire the preferred stock in whole upon the First day of January, 1902;

NOW, THEREFORE, It is hereby unanimously

Resolved, (1) That the Northern Pacific Railway Company, in exercise of its right specifically expressed in each and every certificate of stock of this Company, has determined, and hereby does determine, to retire the preferred stock of the Northern Pacific Railway Company, in whole, at par, upon the first day of January, 1902.

(2) That notice of the retirement of the preferred stock, substantially in the form of that annexed to the minutes of this meeting, be published in the manner prescribed by the by-laws

for notice of stockholders' meetings, and that a copy thereof be mailed to every stockholder of this Company.

(3) That for the purpose of raising the funds necessary to retire the preferred stock, this Company will make and will issue its negotiable bonds, dated November 15, 1901, for the aggregate principal sum of $75,000,000, payable January 1, 1907, in gold coin of the United States of the present standard of weight and fineness, at this Company's office in the City of New York, with interest in like gold coin at the rate of four per cent. per annum from January 1, 1902, payable semi-annually at said office. Every such bond shall be convertible into shares of the common stock of this Company, at the rate of one share of $100 for each $100 of the principal sum of such bond remaining unpaid at the date of such conversion; and upon surrender to it of any such bond this Company will issue to the holder of such surrendered bond, shares of this Company's common stock at the rate aforesaid. Such conversion may be made by the Company at its option at any time after November 15, 1901, and shall be made at the demand of any holder of any such bond at any time on or after the first day of January, 1902. Such bonds shall be coupon bonds or registered bonds, in denominations each of $1,000 or of some multiple thereof, and shall be in such form as shall be determined by the President or the Vice-President of this Company. Every such bond shall be subscribed by the President or a Vice-President, and by the Secretary or an Assistant Secretary and shall be issued under the corporate seal.

(4) That the President and the Vice-President of this Company, and each of them, be, and hereby they are, authorized and empowered to contract to sell and to sell all or any of said bonds at a price not less than par and accrued interest; and in such contract to provide for the delivery of all or any part of said bonds upon receiving such payment therefor, on or prior to or after December 31, A. D. 1901; and also to covenant and agree that any and all moneys received for said bonds shall be specifically appropriated and used exclusively for the retirement of the preferred stock at par; and accordingly it is hereby expressly declared that all such proceeds shall be set apart and shall be held as a trust fund for such purpose.

Any such contract for delivery of such bonds prior to January 1, 1902, may provide for the payment of the whole or any part of the purchase price of said bonds with allowance of interest, at a rate not exceeding four per cent. per annum from the time of the receipt of the price of such bonds until January 1, 1902, the date when such bonds begin to bear interest.

Any and every such contract shall contain a provision giving to the holder of every share of this Company's common stock now outstanding suitable opportunity on demand to receive through or from the purchaser of said bonds under said contract, at a price not exceeding par and accrued interest, such

bonds (or a like amount of common stock received upon conversion of such bonds, if theretofore converted) to an amount equal to seventy-five eightieths of the par amount of said common stock at such time owned by such holder; and for the purpose of providing for subdivision of interests, suitable certificates representing fractional interests in bonds from time to time may be issued, and may be redeemed in such manner as shall be determined by the President or the Vice-President.

(5) That the proper officers of this Company be, and hereby they are, directed, out of the proceeds of said bonds, and out of any other moneys in the Company's treasury available for that purpose, to pay at the Company's New York office, to each holder of record of the preferred stock of this Company on and after January 1, 1902, upon surrender of the certificates for such stock, $100 for each and every of the shares of preferred stock for which the certificates shall be so surrendered.

(6) That all of the preferred stock of this Company be, and hereby it is, declared to be retired from and after December 31, A. D. 1901; and that from and after that date all of the authorized capital stock of this Company, fixed at $155,000,000 by resolution of this Company's stockholders at the meeting thereof held on the first day of July, 1896, be of one kind and be without preference in favor of any part thereof, and the total authorized capitalized stock of this Company continue to be $155,000,000 as so fixed at said meeting.

(7) That the President, the Vice-President, the Treasurer and Secretary of the Northern Pacific Railway Company be, and hereby they are, authorized from time to time to take all proceedings and to do all acts necessary or suitable to carry these resolutions fully into effect.

(8) That for the purpose of the retirement of the preferred stock, the transfer books of the stock of this company be closed at three o'clock P. M. on Tuesday, December 10, 1901; and that the transfer books of the common stock be reopened upon Thursday, January 2, 1902, at ten o'clock A. M.

* * * * * * * *

On motion, the meeting then adjourned.

GEO. H. EARL,
Secretary.

NORTHERN PACIFIC RAILWAY COMPANY.

RETIREMENT OF PREFERRED STOCK.

To the Holders of Preferred Stock of the Northern Pacific Railway Company:

Notice hereby is given that in exercise of the power reserved by the Northern Pacific Railway Company and specifically declared in every outstanding stock certificate, the Company has duly determined to retire the preferred stock, and the same will

be retired, in whole, at par, upon the first day of January, 1902. Accordingly each and every holder of preferred stock is notified to present and to surrender his certificate for such preferred stock at the office of the Northern Pacific Railway Company, 49 Wall street, in the City of New York, on and after the first day of January, 1902, and upon such surrender to receive payment in cash of the par amount thereof.

For the purpose of such retirement, the transfer books of the Northern Pacific Railway Company will close at three o'clock P. M. on Tuesday, December 10, 1901, and the transfer books of the common stock will reopen Thursday, January 2, 1902, at ten o'clock A. M.

By order of the Board of Directors,
GEO. H. EARL,
Secretary.

Dated November 13, 1901.

NORTHERN PACIFIC RAILWAY COMPANY.

EXECUTIVE COMMITTEE,

EIGHTY-SEVENTH MEETING, NOVEMBER 15, 1901.

The Executive Committee of the Board of Directors of the Northern Pacific Railway Company met, pursuant to due notice, at the office of the Company, No. 49 Wall Street, New York City, on Friday, November 15, 1901, at 3:30 o'clock P. M.

The following Directors (constituting a quorum) were present:

Messrs. George F. Baker,
James J. Hill,
John S. Kennedy,
Charles S. Mellen.

The Chairman laid before the Committee a form of convertible certificate, which had been prepared to meet the requirements of the resolutions of November 13, 1901.

After consideration of such form of proposed convertible certificate, it was, by the affirmative vote of all present,

Resolved, That the form of convertible certificate now submitted by the Chairman for the purpose of meeting the requirements of the resolutions of November 13, 1901, be and hereby the same is, approved; and that the President or any Vice-President, and the Secretary or any Assistant Secretary, be, and hereby they are, authorized and directed from time to time to make and execute such convertible certificates for the aggregate principal sum of $75,000,000; and that the proper officers of the Company be, and hereby they are, authorized from time to time to issue the same for the purposes, and upon the terms specified in the said resolutions of November 13, 1901.

The Chairman then laid before the Committee a form of agreement or contract with The Standard Trust Company of New York as Contractor, for the sale and delivery of such con-

vertible certificates at a price not less than par and accrued interest, as provided for in the fourth of said series of resolutions adopted November 13, 1901.

On motion, and by the affirmative vote of every member present, it was

Resolved, That the President and Vice-President of this Company, and each of them, be and hereby they are, authorized and empowered to execute and deliver the said contract under the corporate seal of this Company, and that the Secretary be, and hereby he is, authorized to affix the corporate seal and to attest the same.

On motion, the following resolutions were unanimously adopted:

Resolved, That the President or Vice-President be, and hereby he is, authorized to sell, at their par value, on or before January 1, 1902, to any holder of common stock of this Company, an amount of the convertible certificates of this Company authorized by the resolutions of the Board of Directors, passed November 13, 1901, equal to seventy-five eightieths of the par amount of the common stock held by such stockholder, provided that in case any such sale shall be made to any stockholder prior to the closing of the transfer books on December 10, 1901, such arrangements shall be made as will prevent any transfer of such stock before the re-opening of the transfer books on January 2, 1902, except subject to the condition that the transferees and subsequent holders of such stock shall release any and all right to purchase any of such bonds from this Company.

Resolved, That to the extent of any moneys received by this Company from sales of convertible bonds of the issue authorized by the Board of Directors by the resolutions passed November 13, 1901, the President or Vice-President be, and hereby he is authorized to retire or take up any of the preferred stock of this Company and to pay therefor upon surrender of the certificates for such preferred stock, duly endorsed in blank for transfer a sum equal to the par value of such preferred stock; and in case any such preferred stock shall be retired or taken up prior to the closing of the transfer books on December 10, 1901, a sum equal to the dividend of one per cent. thereon declared payable on January 1, 1902, shall be paid to such holder out of the surplus of the Company.

Resolved, That to the extent that preferred stock of this Company shall have been retired or taken up, the President or Vice-President be authorized to cause the convertible certificates of this Company that shall have been issued under the resolutions of the directors passed November 13, 1901, to be converted at par into common stock, and to cause the common stock of this Company to be issued upon any such conversion.

Resolved, That the officers of this Company be authorized and directed, under the direction of the President or Vice-

President, to do all acts and things required to carry the foregoing resolutions into effect.

On motion, the meeting then adjourned.

GEO. H. EARL,
Secretary.

No..... UNITED STATES OF AMERICA. $.....

NORTHERN PACIFIC RAILWAY COMPANY.

TEMPORARY FOUR PER CENT. CONVERTIBLE CERTIFICATE.

Northern Pacific Railway Company (hereinafter termed the "Railway Company"), for value received, promises to pay to bearer, or to the registered holder of this certificate, if the same shall be registered, on the first day of January, 1907, upon presentation and surrender of this certificate for cancellation, at its office in the City of New York,.....
.....Dollars, in the gold coin of the United States of America of the present standard of weight and fineness, and to pay interest thereon at the rate of four per cent. per annum from January 1, 1902, such interest being payable at said office, in like gold coin semi-annually, on the first day of January and the first day of July in each year, to the bearer or to the registered holder of this certificate, upon presentation of the certificate and endorsement of such payment thereon. Both the principal and interest of this certificate are payable without deduction for any tax or taxes which the Railway Company may be required to pay or to retain therefrom, under any present or future law of the United States, or of any State, county or municipality therein.

Upon demand of the holder of this certificate at any time after January 1, 1902, and upon presentation and surrender of this certificate for cancellation, this certificate shall be convertible into common stock of the Railway Company, at the rate of one share of $100 for each $100 of the unpaid principal of this certificate, and upon such demand and such presentation and surrender of the certificate, the Railway Company will issue to the holder its common stock at the rate aforesaid. In case the Railway Company shall fail to make such conversion, then and in every such case, at the option of the holder, the principal of this certificate shall become and be forthwith due and payable, with the interest accrued and unpaid.

At any time after the date hereof, at its election, the Railway Company may require the holder of this certificate to convert the same into common stock of the Railway Company, at the rate of one share of $100 for each $100 of the unpaid principal of this certificate; and upon advertisement by the Railway Company of such election, in either "The New York Times" or "The New York Tribune," newspapers published in the City of New York, the holder shall, upon presentation

and surrender hereof, be entitled to receive common stock of the Railway Company at the rate of one share of $100 for each $100 of the unpaid principal of this certificate; and from and after such advertisement no interest shall accrue or be payable upon or in respect of this certificate from the interest day next preceding the date of such advertisement, and the principal of this certificate shall not be payable in cash, but the holder shall be entitled only to receive common stock of the Railway Company in exchange for this certificate as hereinbefore provided.

This temporary certificate is exchangeable for an engraved or lithographed certificate when the same shall be ready for delivery and is one of a series of similar certificates of the Railway Company, issued and to be issued for the aggregate principal sum of $75,000,000, such issue having been authorized by resolution of the Board of Directors of the Railway Company passed November 13, 1901, to which reference hereby is made. All moneys received for the certificates of said issue have been specifically appropriated and will be used exclusively for the retirement at par of the preferred stock of the Railway Company, and will be set apart as a trust fund for such purpose.

This certificate may be registered in the owner's name on the books of the Railway Company, at its office or agency in the City of New York, such registry being noted on the certificate by the certificate registrar of the Railway Company. After such registration, no transfer shall be valid unless made on the Railway Company's books by the registered owner and similarly noted on the certificate; but the same may be discharged from registry by being transferred to bearer, and thereafter transferability by delivery shall be restored; but this certificate again from time to time may be registered or transferred to bearer as before.

IN WITNESS WHEREOF, The Northern Pacific Railway Company has caused these presents to be signed by its President or one of its Vice-Presidents, and its corporate seal to be hereunto affixed and to be attested by its Secretary or an Assistant Secretary, this fifteenth day of November, 1901.

NORTHERN PACIFIC RAILWAY COMPANY,
By

[L. S.] .....

President.

Attest:

.....

Secretary.

MEMORANDUM OF AGREEMENT, made this..... day of November, A. D. 1901, by and between NORTHERN PACIFIC RAILWAY COMPANY, a corporation of the State of Wisconsin, of the first part, and THE STANDARD TRUST COMPANY OF NEW YORK, a corporation of the State of New York (hereinafter termed the "Trust Company"), of the second part,

WITNESSETH, That the parties hereto have mutually agreed as follows:

ARTICLE I.

On January 1, 1902, Northern Pacific Railway Company agrees to sell and to deliver to the Trust Company, and the Trust Company agrees to buy from Northern Pacific Railway Company, at their face value, all the convertible certificates of indebtedness of the Northern Pacific Railway Company for the aggregate principal sum of Seventy-five million dollars ($75,000,000), of the issue authorized by vote of the directors of said Company passed November 13, 1901, except such of said certificates as shall be purchased by the holders of the common stock of said corporation, as recited in Article III. of this Agreement.

Such convertible certificates are to be dated November 15, 1901, and to be payable on January 1, 1907, in gold coin of the United States of the present standard of weight and fineness, at Company's office in the City of New York, and to bear interest in like gold coin at the rate of four per cent. per annum from January 1, 1902, payable semi-annually at said office. Every such certificate shall be convertible into shares of the common stock of the Northern Pacific Railway Company at the rate of one share of One hundred dollars ($100) par value for each One hundred dollars ($100) of the principal of such certificate remaining unpaid at the date of such conversion; and upon surrender to it of any such certificate said Railway Company will issue to the holder of such surrendered certificate shares of its common stock at the rate aforesaid. Such conversion may be made by the Northern Pacific Railway Company, at its option, at any time after November 15, 1901, and shall be made at the demand of any holder of any such certificate at any time on or after January 1, 1902 Such certificate shall be in denominations each of One thousand dollars, or some multiple thereof, and shall be substantially of the tenor of the draft thereof, marked "Exhibit A," hereto attached.

Until engraved or lithographed certificates can be prepared, temporary certificates, in form satisfactory to the Trust Company, shall be deliverable hereunder, which temporary certificates shall be exchangeable for engraved or lithographed certificates as soon as the same shall be ready for delivery.

ARTICLE II.

Northern Pacific Railway Company covenants and agrees with the Trust Company that all moneys received for such cer-

tificates shall be specifically appropriated and used exclusively for the retirement of the preferred stock of the Northern Pacific Railway Company at par, and shall be set apart as a trust fund for such purpose.

ARTICLE III.

It is understood and agreed that suitable opportunity shall be given to every holder of common stock of the Northern Pacific Railway Company registered at the closing of the transfer books on December 10, 1901, to purchase and to pay for, at the price hereinafter stated, an amount of such certificates (subject to a proper adjustment for fractional amounts of certificates) equal to seventy-five eightieths of the par amount of such common stock owned of record by such stockholder.

At any time prior to the sale and delivery of such certificates to the Trust Company, the Northern Pacific Railway Company may sell and deliver, at the price hereinafter stated, to any such holder of common stock, the amount of such certificates which such holder of the common stock is to be given such opportunity to purchase; but in case any such sale be made to any stockholder prior to the closing of the transfer books on December 10, 1901, such arrangements shall be made as will prevent any transfer of such stock before the reopening of the transfer books on January 2, 1902, except subject to the condition that the transferees and subsequent holders of such stock, prior to such reopening of the transfer books, shall release any and all right to purchase any of such certificates from the Northern Pacific Railway Company. As soon as practicable, the Northern Pacific Railway Company, by notice, shall extend to each holder of its common stock registered at the closing of the transfer books on December 10, 1901, suitable opportunity, until January 1, 1902, to purchase, at the price hereinafter stated, an amount of such certificates (subject to adjustment as aforesaid) equal to seventy-five eightieths of the par amount of such common stock owned of record by such stockholder.

After the sale and delivery to the Trust Company of such of said certificates as shall not have been purchased by the stockholders of the Northern Pacific Railway Company, the Trust Company will give to every holder of common stock of said Company registered at the closing of the transfer books on December 10, 1901 (other than holders of common stock who previously shall have purchased, or shall have had suitable opportunity to purchase, a ratable share of such certificates, as aforesaid), suitable opportunity, not later than March 1, 1902, to receive, on demand, through or from the Trust Company, upon payment to the Trust Company of the price hereinafter stated, an amount of such certificates (subject to adjustment as aforesaid) equal to seventy-five eightieths of the par amount of such common stock owned of record by such stockholder (or a

like amount of common stock received upon conversion of such certificates if theretofore converted).

The price payable for all such certificates sold under this Article on or before January 1, 1902, shall be a sum equal to the principal thereof. The price payable for all such certificates sold and delivered under this Article after January 1, 1902, shall be a sum equal to the principal thereof, and the interest accrued thereon. The price payable for any stock received upon conversion of such certificates shall be the same as the price which would have been payable for a corresponding amount of such certificates.

Under the provisions of this Article every such holder of common stock shall *only* be given the opportunity to purchase, either from the Trust Company or from the Northern Pacific Railway Company, such amount of such certificates (or stock) as in the aggregate shall be equal to seventy-five eightieths of the par amount of the common stock owned of record by such stockholder at the closing of the transfer books on December 10, 1901.

ARTICLE IV.

In case the Northern Pacific Railway Company shall fail to sell and to deliver such certificates to the Trust Company at the times and in the manner herein provided, or shall fail to comply with all its agreements herein contained, or in case the Northern Pacific Railway Company shall fail to issue its common stock in exchange for all certificates delivered hereunder to the Trust Company when and as demand therefor shall be made by the Trust Company or other holder, then and in any such case the Trust Company, at its option, by notice delivered at the office of the Northern Pacific Railway Company in the City of New York, may forthwith rescind this agreement, and thereupon the Northern Pacific Railway Company, upon surrender to it of any such certificates, shall be bound to repay to the Trust Company or other holder the price paid for such certificates hereunder, with proper allowance of interest.

This agreement shall be deemed strictly *inter partes*, and shall not give any rights to any person or corporation except the Trust Company and the Northern Pacific Railway Company, except as provided in the certificates themselves.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be signed by their officers duly authorized the day and year first above written.

NORTHERN PACIFIC RAILWAY COMPANY,

by

.....

THE STANDARD TRUST COMPANY OF NEW YORK.

by

.....

NORTHERN PACIFIC RAILWAY COMPANY

EXECUTIVE COMMITTEE,

EIGHTY-EIGHTH MEETING, NOVEMBER 18, 1901.

The Executive Committee of the Board of Directors of the Northern Pacific Railway Company met, pursuant to due notice, at the office of the Company, No. 49 Wall Street, New York City, on Monday, November 18, 1901, at 2 o'clock P. M.

The following Directors (constituting a quorum) were present:

Messrs. George F. Baker,
EDWARD H. HARRIMAN,
James J. Hill,
John S. Kennedy,
Charles S. Mellen.

* * * * * * * *

On motion, the following resolutions WERE UNANIMOUSLY ADOPTED:

Resolved, That the President or Vice-President cause to be engraved and printed new forms of stock certificates of this Company to be issued after January 1, 1902, on which date the retirement of the preferred stock of this Company is to take effect, which new forms of stock certificates shall be substantially of the following tenor, to-wit:

Capital Stock $155,000,000.

No. .... Shares.

NORTHERN PACIFIC RAILWAY COMPANY

This is to certify that
is the owner of fully-paid and non-assessable shares, of the par value of one hundred dollars each, in the capital stock of the Northern Pacific Railway Company, transferable only in person, or by attorney, upon the books of the Company, at the office of its Transfer Agents in the City of New York, upon surrender of this certificate.

This certificate is not valid unless registered by the Registrar of Transfers of the Company in the City of New York.

Witness the signatures of the President or one of the Vice-Presidents of said Company, and of J. P. Morgan & Co., its Transfer Agents in the City of New York.

New York.....

Vice-President.

Transfer Agents.
Registered:
CENTRAL TRUST COMPANY OF NEW YORK,
By.....Registrar.

Secretary.

Resolved, That until January 2, 1902, and until the common stock to be issued in exchange for the convertible certificates of this Company, issued and to be issued under the resolutions of the Board of Directors, passed November 13, 1901, shall have been listed at the New York Stock Exchange, the President or Vice-President, and the Secretary, in behalf of the Company, shall cause to be executed and delivered temporary certificates for any such common stock to be issued upon the conversion into common stock of any such convertible certificates, which temporary stock certificates shall be signed by the President or Vice-President and by the Secretary, but shall not require the signature of the transfer Agents, and shall not be registered by the registrar of transfers; and such temporary stock certificates shall be substantially of the following tenor, viz.:

No..... .....Shares.

NORTHERN PACIFIC RAILWAY COMPANY.

TEMPORARY CERTIFICATE FOR COMMON STOCK.

Issued upon Conversion of 4% Convertible Certificates under Resolutions of the Board of Directors passed November 13, 1901.

This is to certify that is the owner of fully paid and non-assessable shares, of the par value of one hundred dollars each, of the Common Capital Stock of the Northern Pacific Railway Company, transferable only in person or by attorney upon the books of the Company upon surrender of this certificate.

Witness the signatures of the President, or one of the Vice-Presidents, of said Company, and of the Secretary, this day of

Vice-President.

Secretary.

Resolved: That the Secretary be, and hereby he is, authorized and directed in behalf of the Company, to issue and publish an offer to Stockholders of common stock of record on December 10, 1901, substantially as follows:

NORTHERN PACIFIC RAILWAY.

OFFER TO HOLDERS OF COMMON STOCK.

NEW YORK, November 23, 1901.

To holders of common stock of Northern Pacific Railway Company of record December 19, 1901:

Every holder of the common stock of the Northern Pacific Railway Company registered as such at the closing of the transfer books on Tuesday, December 10, 1901, will have, and hereby

is offered, the opportunity to purchase at par, to an amount equal to seventy-five eightieths of the par amount of the common stock held by him at the closing of the transfer books on December 10, 1901, convertible certificates of indebtedness of the Northern Pacific Railway Company, part of a total issue for $75,000,000 authorized by vote of the Directors of the Company passed November 13, 1901.

Such convertible certificates are to be dated November 15, 1901, and to be payable on January 1, 1907, in gold coin of the United States of the present standard of weight and fineness, at the Company's office, in the City of New York, and to bear interest in like gold coin at the rate of four per cent. per annum from January 1, 1902, payable semi-annually at said office. Every such certificate shall be convertible into shares of the common stock of the Northern Pacific Railway Company at the rate of one share of one hundred dollars ($100) par value for each one hundred dollars ($100) of the principal of such convertible certificate remaining unpaid at the date of such conversion, and upon surrender to it of any such convertible certificate the Railway Company will issue to the holder of such surrendered convertible certificate, shares of its common stock at the rate aforesaid. Such conversion may be made by the Northern Pacific Railway Company at its option at any time after November 15, 1901, and shall be made at the demand of any holder of any such certificate at any time on or after January 1, 1902.

Such convertible certificates shall be in denominations each of one thousand dollars or some multiple thereof, and shall be substantially of the tenor of the draft thereof on file in the New York office of the Railway Company. For any fractional interest to which any common stockholder may be entitled under this offer, there will be issued scrip representing such fractional interest redeemable in convertible certificates when presented in even equivalents.

All of the moneys received for such convertible certificates will be specifically appropriated and used exclusively for the retirement of the preferred stock of the Northern Pacific Railway Company at par, and will be set apart as a trust fund for such purpose.

The Railway Company has contracted to sell and deliver to other parties on the same terms all of said issue of convertible certificates of indebtedness except such as shall be purchased by the holders of the common stock.

Payments for such convertible certificates must be made at the office of the Northern Pacific Railway Company at 49 Wall Street, New York, on or before December 31, 1901. Convertible Certificates in temporary form will be ready for delivery, and payment therefor may be made, at said office at any time during business hours from and after December 11, 1901.

Stockholders desiring to avail of this opportunity to purchase

such Convertible Certificates must file their application therefor in the form herewith enclosed on or before December 24, 1901.

By order of Directors,
GEORGE H. EARL,
Secretary.

Northern Pacific Railway Company, Directors' Eighty-fifth Meeting, January 8, 1902.

At a meeting of the Board of Directors held, pursuant to due notice, at the office of the Company, No. 49 Wall Street, New York City, on Wednesday, January 8, 1902, at 2 o'clock P. M., there were present the following Directors (constituting a quorum) viz.:

Messrs. Baker,
Clough,
HARRIMAN,
Ives,
James,
Kennedy,
Lamont,
Mellen,
Rockefeller,
Steele,
Spencer,
Stillman,
Thomas,
Twombly.

The minutes of meeting held December 11, 1901, were read and approved.

THE EXECUTIVE COMMITTEE REPORTED BY THE READING OF THE MINUTES OF ITS MEETINGS HELD NOVEMBER 15TH AND 18TH, 1901, DECEMBER 14TH, 1901, AND JANUARY 2, 1902, AND ON MOTION THE COMMITTEE'S ACTION AS REPORTED WAS APPROVED, RATIFIED AND CONFIRMED.

The President submitted the following forms of notices which had been duly published, to wit:

NORTHERN PACIFIC RAILWAY CO.

NOTICE THAT PREFERRED STOCK HAS BEEN RETIRED.

To the Holders of Certificates for Preferred Stock of the Northern Pacific Railway Company:

Notice is hereby given that in the exercise of the power reserved by the Northern Pacific Railway Company and specifically declared in every stock certificate issued and outstanding prior to Nov. 15, 1901, the Company has retired the preferred stock and the same was retired in whole upon the 1st day of January, 1902. Each and every holder of a certificate for preferred stock not heretofore surrendered is notified that upon

presentation and surrender of his certificate at the office of the Northern Pacific Railway Company, 49 Wall Street, in the City of New York, he will receive payment in cash of the par amount of such certificate.

No holder of any certificate for preferred stock now has or hereafter will have any right as stockholder nor any claim against the Company, except to receive payment for certificates surrendered at the rate above stated.

Dated January 2, 1902.

By order of the directors,
GEORGE H. EARL,
Secretary.

NORTHERN PACIFIC RAILWAY CO.

NOTICE TO HOLDERS OF 4% CONVERTIBLE CERTIFICATES.

JANUARY 2, 1902.

Notice is hereby given to all holders of Four Per Cent. Convertible Certificates of the Northern Pacific Railway Company, dated November 15, 1901, and issued under and pursuant to the resolutions of the Board of Directors of this Company adopted November 13, 1901, that the Railway Company has elected to require and hereby does require the holder of every such certificate to convert the same into Common Stock of the Northern Pacific Railway Company at the rate of one share of $100 for each $100 of the unpaid principal of the certificate and upon presentation and surrender of such certificate at the office of this Company, 49 Wall Street, in the City of New York, the holder will be entitled to receive therefor Common Stock of the Railway Company at the rate aforesaid. No interest will accrue or be payable upon or in respect of any such certificate from and after the first day of January, 1902.

By Order of the Directors.

NORTHERN PACIFIC RAILWAY COMPANY
By DANIEL S. LAMONT,
Vice-President.

Attest:
GEORGE H. EARL,
Secretary.

ON MOTION, it was

Resolved, THAT THE ISSUANCE AND PUBLICATION OF THE FOREGOING NOTICES BE AND THE SAME HEREBY IS APPROVED AND RATIFIED.

The President reported that, pursuant to the resolutions and instructions of the Directors, $75,000,000 of Convertible 4% Certificates were sold by the officers of the Company at par, and the proceeds deposited with the fiscal agents of the Company, for the redemption of the whole of the Preferred Stock Certificates which were duly retired January 1st, of which Certificates for 713,140 shares have already been redeemed and can-

celed; and that the entire issue of $75,000,000 of Convertible Certificates has been exchanged by its owners for a like amount of the Common Stock of the Company, at par, making the present capital of the Company consist of 1,550,000 shares of Common Stock, at $100 each.

Mr. Clough gave notice that at the next regular meeting of the board, he would move for adoption the following resolutions for amendment of the By-Laws.

Resolved, That Section 3 of Article I. concerning notice of meetings of Stockholders, be amended by changing the words "Four" and "three" to "two" before the word "weeks," and by striking out the words "St. Paul," "London and Berlin," so that the same shall read as follows:

SECTION 3. NOTICE OF MEETINGS.—Written or printed notice of every meeting of Stockholders shall be advertised at least once in each week for two weeks immediately preceding such meeting in one or more daily or weekly newspapers published in the cities of Milwaukee and New York, which notice shall, in general terms, state the object of the meeting. At least two weeks before such meeting a copy of such notice shall be mailed from one of the offices of the Company to each Stockholder of record who shall have furnished to the Company's Stock Transfer Agents in the city where the certificates of such Stockholder shall have been issued, an address to which such notice may be sent; but failure to mail any such notice shall not invalidate any action taken at such meeting or at any adjournment thereof.

Resolved, That Section 4 of Article I. of the By-laws be amended by striking out and cancelling the last paragraph thereof, as follows:

These provisions, however, are subject to the rights of the holders of Preferred Stock.

Resolved, That Section 5, Section 6 and Section 7 of Article II. of the By-laws be, and hereby the same are, repealed, and in lieu thereof the following section be, and hereby the same is, adopted:

SECTION 5. MEETINGS OF THE BOARD.—Meetings of the Board shall be held whenever called, by direction of the President or of the Vice-President or of any three of the Directors for the time being in office.

The Secretary or the Assistant-Secretary shall give notice of each meeting, by mailing the same at least two days before the meeting, or by telegraphing the same at least one day before the meeting, to each Director; but such notice may be waived by any Director.

Unless otherwise indicated in the notice thereof, any and all business may be transacted at any meeting.

At any meeting at which every Director shall be present, even though without notice, any business may be transacted.

Resolved, That Section 10 of Article II. of the By-laws be amended so as to read as follows:

SECTION 8. EXECUTIVE COMMITTEE.—The Executive Committee shall consist of six (6) directors, of whom the President, and in case of his absence from the meeting, the Vice-President, shall be one *ex-officio*. It shall possess and exercise all the powers of the Board of Directors, except when the latter is in session, but it may act only by the concurrent vote of not less than four (4) in number. It shall keep a record of all its proceedings, and the same shall be submitted to the Board of Directors. The Executive Committee shall have the power to fill any vacancy in its own number, but the director so chosen shall serve as a member of the committee only until the next meeting of the Board of Directors, or until a successor shall have been elected by the Board. The Secretary, or, in his absence from the meeting, an Assistant Secretary, or other officer or employee of the Company may act as Secretary of the Committee. A majority of the committee shall be a quorum. Meetings of the Executive Committee shall be held whenever called by the direction of the President or of the Vice-President or of any two members of the Committee.

The Secretary or the Assistant Secretary shall give notice of each meeting by mailing the same, or by telegraphing the same, one day before the meeting, to each member; but such notice may be waived by any member.

Unless otherwise indicated in the notice thereof, any and all business may be transacted at any meeting.

At any meeting at which every member of the Committee shall be present, even though without notice any business may be transacted.

Resolved, That Section 8, Section 9, Section 10 and Section 11, of Article II. of the By-laws, be amended so as to be numbered, respectively, Section 6, Section 7, Section 8 and Section 9.

Resolved, That Section 4 of Article III. of the By-laws be, and hereby the same is, amended by striking out the second paragraph thereof.

Resolved, That the first clause of subdivision (*b*) of Section 1 of Article IV. of the By-laws be, and hereby the same is repealed.

On motion, the Secretary was instructed to send to each Director at least ten days before the next regular meeting a copy of the proposed amendments.

On motion, the meeting then adjourned.

GEO. H. EARL,
Secretary.

Verified Minutes Northern Securities Company.
(Filed April 19, 1904.)

IN THE CIRCUIT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MINNESOTA.

UNITED STATES OF AMERICA, Plaintiff,
AGAINST
NORTHERN SECURITIES COMPANY and others, Defendants.

IN RE APPLICATION OF EDWARD H. HARRIMAN AND WINSLOW S. PIERCE FOR LEAVE TO INTERVENE.

STATE OF NEW YORK, City and County of New York, } ss.:

I, WM. H. BRUDER, a Notary Public in and for the City and County aforesaid, do hereby certify that on this seventh day of April, 1904, Edward T. Nichols came before me, and having been first duly sworn did depose and say:

I am 51 years of age and live in Morristown, in the State of New Jersey; since November 14, 1901, I have continuously been Secretary of the said company, and a director, and as such have attended all meetings of the Board of Directors of said company, and as Secretary have made all entries of the minutes of the proceedings of said Board in the records of said company.

During all the period aforesaid Mr. Edward H. Harriman, one of the petitioners aforesaid, has also been a director, and a member of the Executive Committee of the Northern Securities Company

During said period meetings of said Board were held on the following named dates, to wit: November 14, 1901, November 19, 1901, December 9, 1902, January 22, 1903, April 17, 1903, November 18, 1903, March 22, 1904, at all of such meetings said Harriman attended, and in the proceedings of which he participated, as a director of the Northern Securities Company.

At the said meeting of November 19, 1901, proceedings were had, with the assent and by the affirmative vote of the said Harriman as such director, set forth in Exhibit No. 1, hereto attached.

The minutes of a previous meeting of said Board, held on November 15, 1901, which minutes were approved by the said Board, at the meeting of November 19th, 1901, are set forth in Exhibit No. 2, hereto attached.

At the said meeting of January 22, 1903, proceedings were had, with the assent and by the affirmative vote of the said Harriman, as such director, set forth in Exhibit No. 3, hereto attached.

Meetings of the Executive Committee of the Northern Securities Company, at which the said Harriman was present, and in the proceedings of which he participated, were held on November 27, 1901, December 19, 1901, January 31, 1902, July 24, 1902, October 16, 1902, January 29, 1903, April 15, 1903, January 11, 1904, and February 24, 1904.

Annual meetings of the stockholders of the Northern Securities Company, for the election of directors, and the transaction of other business, were held at the company's offices in Hoboken, New Jersey, on November 10, 1902, and November 9, 1903.

At each of said meetings the said Harriman and Pierce attended, by myself as their proxy, and participated in all the business transacted at said meetings.

True copies of said proxies are hereto attached as Exhibits 4 and 5.

EDW'D T. NICHOLS.

Subscribed and sworn to before me in the City of New York, this 7th day of April, 1904.

WM. H. BRUDER,
[SEAL.] Notary Public,
New York County.

NORTHERN SECURITIES COMPANY.

INCORPORATORS' FIRST MEETING.

NOVEMBER 13, 1901.

The first meeting of the incorporators of the Northern Securities Company was held at the office of the Hudson Trust Company, at No. 51 Newark Street, in the City of Hoboken, New Jersey, on Wednesday, the 13th day of November, 1901, at 12 o'clock noon.

There were present: George F. Baker, jr., Abram M. Hyatt and Richard Trimble being all the incorporators and all the subscribers to the capital stock of the Company.

The following proceedings were had.

The meeting was called to order by Mr. Baker, and on motion, Mr. Hyatt was elected Chairman and Mr. Trimble was elected Secretary.

Mr. Hyatt took the Chair, and Mr. Trimble presented a copy of the certificate of incorporation of the Company, which was duly recorded in the office of the Clerk of Hudson County, New Jersey, on November 13, 1901, and duly filed in the office of the Secretary of State of New Jersey on November 13, 1901. It was ordered that a copy thereof be prefixed to the minutes of this meeting.

Mr. Trimble then presented a waiver of notice of this meeting, and it was ordered that the same be filed with the Secretary.

Mr. Trimble thereupon submitted for the consideration of the incorporators a set of by-laws. After some discussion, and on motion and by affirmative vote of all present, it was

Resolved, that the by-laws now submitted to this meeting by Mr. Trimble be and hereby the same are adopted as the by-laws of the Corporation, subject to alteration or amendment thereof as therein provided from time to time by the Board of Directors, and that a copy thereof be affixed to the minutes of this meeting.

Upon motion and by affirmative vote of all present it was

Resolved, that the incorporators do proceed to the election of the first Board of Directors of the Company, such Board to consist of three Directors and to be classified, as provided in the by-laws and certificate of incorporation, by electing one Director for a term of one year, one for a term of two years and one for a term of three years; and that Mr. August T. Pupke and Mr. James H. P. Reilly, be, and hereby they are, appointed Inspectors of Election.

The inspectors having duly qualified, the polls were opened, and remained open until all the incorporators and subscribers to the capital stock of the Company had voted; the polls thereupon being closed, the vote was canvassed and the Inspectors reported that the ballot showed that the following named persons were unanimously elected Directors for the terms set opposite their respective names, votes representing three hundred (300) shares having been cast for each of such persons, that is to say:

First Class: George F. Baker jr.—to hold office for one year;

Second Class: Abram M. Hyatt—to hold office for two years.

Third Class: Richard Trimble—to hold office for three years.

The Chairman then presented to the meeting an instrument, signed by all the incorporators and subscribers to the capital stock of the Company, waiving assessments and notice of assessments on their subscriptions, and it was ordered that such instrument be filed with the Secretary.

On motion and by affirmative vote of all present, it was

Resolved, that the Directors assess the stock heretofore subscribed for one hundred (100) per cent., in accordance with the terms of the waiver signed by the subscribers.

The following resolutions were adopted by affirmative vote of all present:

Resolved and ordered, that in compliance with the laws of the State of New Jersey (Revision of 1896, approved April 21, 1896) this Corporation have and continuously maintain a principal office and place of business within the State of New Jersey and have an agent at all times in charge thereof and upon which agent process against this Corporation may be served, and therein keep the stock and transfer books for the inspection

of all who are entitled to see the same and for the transfer of stock; that the books in which the transfers of stock shall be registered and the books containing the names of the shareholders shall be at all times during the usual hours of business open to the examination of every stockholder at such principal office; and that the name of this Corporation be at all times conspicuously displayed at the entrance of its principal office in this State.

Resolved and ordered, that until the location of the principal office of the Company shall be changed by the stockholders or by the Board of Directors, as authorized by law, the principal office and place of business of the Company be in and at the office of the Hudson Trust Company, at No. 51 Newark Street, Hoboken, New Jersey.

Resolved and ordered, that until otherwise directed by the Board of Directors, the Hudson Trust Company be, and hereby it is, appointed agent of this Corporation, upon whom legal process against this Corporation may be served within the State of New Jersey, and also the Transfer Agent of the stock of this Corporation.

On motion, the meeting thereupon adjourned.

Secretary.

NORTHERN SECURITIES COMPANY.

Directors' First Meeting.

November 13, 1901.

The first meeting of the Board of Directors of Northern Securities Company was held at the office of the Hudson Trust Company, No. 51 Newark Street, Hoboken, N. J., on November 13th, 1901, at twelve thirty o'clock in the afternoon.

Present—George F. Baker, jr., Abram M. Hyatt, Richard Trimble, being all the Directors.

On motion, Mr. Hyatt was elected temporary Chairman and Mr. Trimble was elected temporary Secretary of the meeting.

Mr. Hyatt took the Chair and called the meeting to order.

Mr. Trimble then presented the minutes of the meeting of the incorporators and subscribers to the Company's capital stock held this 13th day of November, 1901, and also a waiver of notice of this meeting signed by all the Directors.

Upon motion, it was

Resolved, that the Board proceed to the election of officers by ballot.

Mr. Hyatt was nominated for President, and, no other nominations being made, a ballot was taken, and Mr. Hyatt was unanimously elected President.

Mr. Trimble was nominated for Secretary, and, no other nominations being made, a ballot was taken, and Mr. Trimble was unanimously elected Secretary.

Mr. Baker was nominated for Treasurer, and, no other nominations being made, a ballot was taken, and Mr. Baker was unanimously elected Treasurer.

The Secretary then took and subscribed his oath as Secretary of the Corporation, which was duly filed.

Upon motion it was

Resolved, That the Treasurer be, and hereby is, authorized to open a bank account in behalf of the Corporation with Hudson Trust Company, 51 Newark St., Hoboken, New Jersey.

Upon motion it was unanimously

Resolved, That until otherwise ordered, the President and Treasurer be authorized to draw checks of this Company for any sums on deposit with any depositary of this Company; and that all checks of the Company be signed by the President and the Treasurer.

Upon motion, by affimative vote of all present, it was

Resolved, That an office of the Company be maintained in the City of New York, and that meetings of the Board of Directors from time to time may be held either at the principal office of the Company in the State of New Jersey or at the office in the City of New York or elsewhere as from time to time shall be ordered by the Board of Directors.

The Treasurer then called attention to the written subscriptions to the capital stock of the Company to the amount of three hundred shares of one hundred dollars each, amounting in the aggregate to thirty thousand dollars ($30,000).

On motion, by affirmative vote of all present, it was

Resolved, that a call be made for the payment in full of subscriptions to the capital stock of the Corporation, such call to be payable upon demand of the Treasurer.

On motion, by affirmative vote of all present, it was

Resolved, that until otherwise ordered by the Board of Directors the common corporate seal is and shall be an impression upon paper or wax of a circular device such as that to be impressed upon the margin hereof, being the words "November, 1901" in a centre, surrounded by the words "Northern Securities Company, New Jersey"; and that the Secretary of the Company procure, preserve and keep duplicate stamps for making such impressions of such corporate seal; and, when and as directed by the Board of Directors or by the President, or any Vice-President, the Secretary or any Assistant Secretary may and shall use one or the other of such duplicate stamps in impressing such corporate seal upon the documents, indentures and obligations of the Company.

The Secretary presented to the Board a draft of certificates for stock of the Company, and

On motion and by affirmative vote of all present, it was

Resolved, that the certificates to be issued by this Company for stock be of the tenor of the draft certificate now submitted, but that pending the preparation of engraved certificates of

such tenor, temporary certificates in form satisfactory to the President and Treasurer may be issued.

On motion and by affirmative vote of all present, it was

Resolved, that the proper officers of the Company be, and hereby they are, authorized and directed in behalf of the company and under its corporate seal or otherwise, to make and file any certificates or other instruments required by law to be filed in any State in which the officers of this Company shall find it necessary to file the same as a condition of transacting the business of the Corporation in that State.

On motion, the meeting thereupon adjourned to meet at the office of the Hudson Trust Company, 51 Newark St., Hoboken, New Jersey, at four o'clock this afternoon.

Secretary.

NORTHERN SECURITIES COMPANY.

Directors' First Meeting (Adjournment).

November 13, 1901.

Meeting of the Board of Directors of the Northern Securities Company, held pursuant to adjournment at No. 51 Newark Street, in the City of Hoboken, on Wednesday, November 13, 1901, at four o'clock, P. M.

Present—George F. Baker, Jr., Abram M. Hyatt, Richard Trimble.

The Treasurer reported that he had received $30,000 in full payment of the 300 shares of the capital stock of the Company, subscribed for by the three subscribers to the certificate of incorporation.

Upon motion, and by the affirmative vote of all the Directors, it was

Resolved, that the officers of this Company be, and hereby they are, authorized and directed to make and file in the office of the Secretary of State a certificate stating that the capital stock with which this Company is to begin business—viz., $30,000—has been paid in, in cash.

Upon motion, and by the affirmative vote of all the Directors, it was

Resolved, that certificates for the fully-paid up shares of the capital stock of this Company subscribed for by the three subscribers to the certificate of incorporation, be issued to such subscribers.

Upon motion, and by the affirmative vote of all the Directors, the following resolution was adopted:

Resolved, That the President be, and hereby he is, authorized, for and in behalf of this Company, to purchase any shares of the common capital stock of the Northern Pacific Railway Company, a corporation organized and existing under the laws of the State of Wisconsin, that shall be tendered to this Company

at a price not exceeding $115 for each share of such capital stock of the par value of $100, such price to be payable in the fully-paid up shares of the capital stock of this Company at par, the Board of Directors having adjudged and determined, and hereby adjudging and determining, that the value of such shares of the capital stock of the Northern Pacific Railway Company is at least $115 per share.

Resolved, That the proper officers of the Company be, and hereby they are, authorized and directed from time to time to make, execute and deliver proper certificates for the fully paid-up shares of the capital stock of this Company in payment for any stock of the Northern Pacific Railway Company acquired pursuant to the foregoing resolution, at the price therein stated.

On motion duly seconded, and by the affirmative vote of all present, the following resolutions were unanimously adopted.

Resolved, that Manhattan Trust Company of New York be, and hereby is appointed Registrar of Transfers of the stock of this Company.

Resolved, that Hudson Trust Company, of Hoboken, New Jersey, be and hereby is appointed Transfer Agent of the stock of this Company.

Resolved, that Hudson Trust Company be and hereby is appointed agent of this corporation upon whom legal process against this corporation may be served within the State of New Jersey.

Upon motion, the meeting adjourned.

Secretary.

NORTHERN SECURITIES COMPANY.

DIRECTORS' SECOND MEETING,

November 14, 1901.

Meeting of the Board of Directors of the Northern Securities Company, duly held pursuant to notice of adjournment at No. 51 Newark Street, in the City of Hoboken, on Thursday, November 14, 1901, at ten o'clock A. M.

Present—George F. Baker, Jr., Abram M. Hyatt, Richard Trimble.

Upon motion, and by the affirmative vote of all the Directors, the following resolution was adopted:

Resolved, That the President be, and hereby he is, authorized, for and in behalf of this Company, to purchase any shares of the preferred capital stock of the Great Northern Railway Company, a corporation organized and existing under the laws of the State of Minnesota, that shall be tendered to this company at a price not exceeding $180 for each share of such capital stock of the par value of $100, such price to be payable in the fully paid-up shares of the capital stock of this Company at par,

the Board of Directors having adjudged and determined, and hereby adjudging and determining that the value of such shares of the capital stock of the Great Northern Railway Company is at least $180 per share.

Resolved, That the proper officers of the Company be, and hereby they are, authorized and directed from time to time to make, execute and deliver proper certificates for the fully paid-up shares of the capital stock of this company, in payment for any stock of the Great Northern Railway Company acquired pursuant to the foregoing resolution, at the price therein stated.

On motion duly seconded, and by the affirmative vote of all present, the following resolutions were unanimously adopted:

Resolved, That a meeting of the Board of Directors be, and hereby the same is, called to be held at 31 Nassau Street, in the City of New York, on Thursday, the 14th day of November, 1901, at two o'clock in the afternoon.

The Secretary reported that, pursuant to the request of Messrs. George F. Baker, Jr., Abram M. Hyatt and Richard Trimble, out of the shares of stock held by the said gentlemen in the Northern Securities Company, there have been transferred shares of stock of this Corporation to the following named gentlemen to the amounts set opposite their names, respectively, viz.:

To John S. Kennedy	1 share
D. Willis James	1 "
Samuel Thorne	1 "
Jas. J. Hill	1 "
E. T. Nichols	1 "
George F. Baker	1 "
Robert Bacon	1 "
Geo. W. Perkins	1 "
D. S. Lamont	1 "
E. H. HARRIMAN	1 "
Jacob H. Schiff	1 "
James Stillman	1 "
W. P. Clough	1 "
George C. Clark	1 "
N. Terhune	1 "

On motion, duly seconded, and by the affirmative vote of all present, being all of the Directors of the Company, it was

Resolved, That the By-Laws of the Company be, and hereby they are amended in the following manner, to wit:

The third paragraph of Section 1 of Article II. is hereby amended as follows, viz., by striking out the following words:

"The number of the first Board of Directors shall be three, but the number of Directors may be altered from time to time, and so soon as deemed advisable by the first Board of Directors shall be increased to fifteen, by the alteration of these By-Laws,"

and by inserting in place thereof the following:

"The number of the Board of Directors shall be fifteen, but the number of Directors may be altered from time to time by the alteration of these By-Laws."

Upon motion, and by the affirmative vote of every Director, it was

Resolved, That the Board of Directors, as at present composed, under the power given to them by the provisions of the By-Laws, do now proceed to the election of twelve additional Directors; one-third thereof—to wit, four directors—for the unexpired portion of the term of one year; one-third thereof—to wit, four directors—for the unexpired portion of the term of two years, and one-third thereof—to wit, four directors—for the unexpired portion of the term of three years.

A ballot having been taken, the following persons, all of whom are stockholders of the Company, were duly elected Directors of the Company for the terms hereinafter specified, namely:

First class,—to hold office for the unexpired portion of the term of the directors of the first class (being one year): James J. Hill, George F. Baker, George W. Perkins, Daniel S. Lamont.

Second class,—to hold office for the unexpired portion of the term of the directors of the second class (being two years): Samuel Thorne, Jacob H. Schiff, James Stillman, W. P. Clough.

Third class,—to hold office for the unexpired portion of the term of the directors of the third class (being three years): J. S. Kennedy, D. Willis James, E. T. Nichols, Robert Bacon.

Upon motion, the meeting adjourned to reconvene at 31 Nassau Street, in the City of New York, at two o'clock this afternoon.

Secretary.

NORTHERN SECURITIES COMPANY.

DIRECTORS' SECOND MEETING—ADJOURNMENT.

NOVEMBER 14, 1901.

A meeting of the Board of Directors of the Northern Securities Company was held at 31 Nassau Street, in the City of New York, this 14th day of November, 1901, at two o'clock P. M., pursuant to adjournment.

The roll being called the following directors answered to their names: Geo. F. Baker, Jr., Abram M. Hyatt, Richard Trimble, James J. Hill, George F. Baker, George W. Perkins, D. S. Lamont, James Stillman, W. P. Clough, John S. Kennedy and E. T. Nichols.

The President occupied the chair.

The minutes of the first meeting of the Board of Directors and of the adjournment thereof, held on November 13, 1901, and of the second meeting, held on November 14, 1901, were read and approved.

Mr. George F. Baker, Jr., tendered his resignation as director and his resignation was accepted.

On motion, duly made and seconded, it was

Resolved, to proceed to the election of a director of the first class to fill the vacancy caused by the resignation of Mr. Baker.

Mr. N. Terhune having been nominated, and no other nominations being made, a vote was taken, and, all the directors present having cast their votes in favor of his election, Mr. Terhune was duly elected director of the first class to fill the vacancy caused by the resignation of Mr. Baker.

Mr. Richard Trimble tendered his resignation as director, and his resignation was accepted.

On motion, duly made and seconded, it was

Resolved, to proceed to the election of a director of the third class to fill the vacancy caused by the resignation of Mr. Trimble.

MR. E. H. HARRIMAN HAVING BEEN NOMINATED, AND NO OTHER NOMINATIONS BEING MADE, A VOTE WAS TAKEN, AND, ALL THE DIRECTORS PRESENT HAVING CAST THEIR VOTES IN FAVOR OF HIS ELECTION, MR. HARRIMAN WAS DULY ELECTED A DIRECTOR OF THE THIRD CLASS TO FILL THE VACANCY CAUSED BY THE RESIGNATION OF MR. TRIMBLE.

MR. TERHUNE AND MR. HARRIMAN THEN APPEARED AND ACCEPTED THEIR ELECTION AS DIRECTORS, AND TOOK THEIR SEATS IN THE BOARD.

Mr. George F. Baker, Jr., tendered his resignation as Treasurer, and on motion his resignation was accepted.

Mr. E. T. Nichols was thereupon nominated for Treasurer, and, no other nominations being made, a vote was taken, and, all the directors present having cast their ballots in favor of his election, Mr. Nichols was elected Treasurer of the Company.

Mr. Abram M. Hyatt then presented his resignation as President of the Company, to take effect upon the election of his successor.

Upon motion, duly seconded, and by the affirmative vote of all present, it was

Resolved, that the resignation of Mr. Hyatt as President of this Company be accepted, and that the Board proceed to the election of a President to fill the vacancy caused by the resignation of Mr. Hyatt.

Mr. James J. Hill was nominated for President, and there being no other nominations, a ballot was taken, and Mr. Hill was duly elected President of this Company, to fill the vacancy caused by the resignation of Mr. Abram M. Hyatt.

Mr. Abram M. Hyatt tendered his resignation as a Director, and his resignation was accepted.

On motion, duly made and seconded it was

Resolved, to proceed to the election of a director of the second class, to fill the vacancy caused by the resignation of Mr. Hyatt.

Mr. George C. Clark having been nominated, and no other nominations being made, a vote was taken, and, all the directors present having cast their votes in favor of his election, Mr. Clark was duly elected a director of the second class to fill the vacancy caused by the resignation of Mr. Hyatt.

Mr. Clark then appeared, accepted his election as director, and took his seat in the Board.

Mr. Richard Trimble thereupon tendered his resignation as Secretary of the Company to take effect after the close of this meeting, and such resignation was accepted.

Mr. E. T. Nichols was nominated for Secretary, and, no other nominations being made, a vote was taken, and, all the directors present having cast their ballots in favor of his election, Mr. Nichols was duly elected Secretary of the Company, the election to take effect after the close of this meeting. Mr. Nichols thereupon took the oath prescribed by law.

Upon motion, duly seconded, and by the affirmative vote of all present, it was resolved that the Board proceed to the election of a First, a Second, a Third and a Fourth Vice President of the Company for the ensuing year.

Mr. John S. Kennedy was nominated for First Vice-President and, there being no other nomination, a ballot was taken and Mr. Kennedy was unanimously elected First Vice-President of this Company.

Mr. George F. Baker was nominated for Second Vice-President and, there being no other nomination, a ballot was taken and Mr. Baker was unanimously elected Second Vice-President of this Company.

Mr. D. Willis James was nominated for Third Vice-President and there being no other nomination, a ballot was taken and Mr. James was unanimously elected Third Vice-President of this Company.

Mr. William P. Clough was nominated for Fourth Vice-President and, there being no other nomination, a ballot was taken and Mr. Clough was unanimously elected Fourth Vice-President of this Company.

Mr. W. P. Clough was appointed General Counsel of the Company.

Upon motion, duly seconded, and upon the affirmative vote of all present, it was

Resolved, that the Board do now proceed to the election of the members of the Executive Committee, to be composed of the President, *ex-officio*, and five Directors. Directors Kennedy, Baker, James, HARRIMAN, and Clough were nominated as members of said Committee. THERE BEING NO OTHER NOMINATIONS, A BALLOT WAS TAKEN AND DIRECTORS KENNEDY, BAKER, JAMES, HARRIMAN AND CLOUGH WERE UNANIMOUSLY ELECTED MEMBERS OF SAID COMMITTEE.

The meeting thereupon adjourned until 2:30 o'clock P. M. of

November 15th, A. D. 1901, at the offices on the ninth floor of the building Nos. 27–29 Pine Street, in New York City.

Secretary.

Exhibit No. 2.

The directors of the Northern Securities Company met at No. 27 Pine Street, New York City, on the 15th of November, 1901, at 2:30 P. M., pursuant to adjournment, of which adjournment written notice had been sent to all Directors.

Present—Messrs. James J. Hill, George F. Baker, Daniel S. Lamont, N. Terhune, George W. Perkins, W. P. Clough, George C. Clark, John S. Kennedy, D. Willis James and E. T. Nichols.

The President occupied the chair.

The minutes of the adjournment of the Directors' second meeting, held at 31 Nassau Street, in the City of New York, at 2 o'clock P. M. on November 14th, 1901, were then read and approved.

Upon motion, duly made and seconded, it was unanimously Resolved, that in case of absence or disability of the President, his duties and authority shall be exercised by the respective Vice-Presidents in the order of their numbers, beginning with the first.

The President stated that he now had an opportunity of acquiring $37,023,000 par value of the common stock, and $41,085,000 par value of the preferred stock, of the Northern Pacific Railway Company, at an aggregate price of $91,407,500, payable, as to $82,491,871, in the fully paid-up and non-assessable shares of this Company at par, and, as to the remaining $8,915,629, in cash.

On motion, and by affirmative vote of all the Directors present, it was

Resolved, That the President be, and hereby he is, authorized in behalf of this Company, to purchase said stock—namely, $37,023,000 par value of the common stock, and $41,085,000 par value of the preferred stock of the Northern Pacific Railway Company, at an aggregate price of $91,407,500, payable as to $82,491,871 thereof in the fully paid up and non-assessable shares of the capital stock of this Company at par, and as to $8,915,629 in cash; and that the officers of this Company be, and hereby they are, authorized to issue fully paid-up and non-assessable shares of stock of this Company to the amount of $82,491,871, and to pay $8,915,629 in cash, in consideration of such $37,023,000 of the common stock and $41,085,000 of the preferred stock of the Northern Pacific Railway Company.

Resolved, That the President be, and hereby he is, author-

ized at any time to retire at par, for cash, any and all preferred stock of the Northern Pacific Railway Company that may be acquired by this Company, and in case such retirement shall be effected prior to January 1, 1902, to allow interest up to January 1, 1902, at the rate of four per cent. per annum, on the sum receivable for such preferred stock.

Resolved, That the President be, and hereby he is, authorized in behalf of this Company to purchase at their par value an amount of the convertible certificates of the Northern Pacific Railway Company, to be issued pursuant to the resolutions of the Board of Directors of the Northern Pacific Railway Company passed November 13, 1901, equal to seventy-five eightieths of the par amount of any and all common stock of the Northern Pacific Railway Company that shall have been acquired by this Company.

Resolved, That the President be, and hereby he is, authorized, in case of the purchase by this Company of any of the convertible certificates of the Northern Pacific Railway Company, to convert the same into common stock of the Northern Pacific Railway Company whenever such conversion may be effected.

Resolved, That the President be, and hereby he is, authorized to borrow, on such terms as he may arrange, any moneys required for the purpose of carrying out the foregoing resolutions, and to make all financial arrangements, and to do all acts and things, which he may deem needful in the premises.

The meeting thereupon, on motion duly made and seconded, adjourned until 2 o'clock P. M. of Tuesday, November 19th, 1901, at the office on the ninth floor of the building No. 27–29 Pine Street, New York City.

Secretary.

Exhibit No. 1.

The Directors of the Northern Securities Company met at 27 Pine Street, New York, on Tuesday, November 19th, 1901, at two o'clock P. M., pursuant to adjournment, of which adjournment written notice had been sent to all Directors.

Present—Messrs. George F. Baker, George C. Clark, W. P. Clough, E. H. HARRIMAN, James J. Hill, D. Willis James, John S. Kennedy, Daniel S. Lamont, E. T. Nichols, George W. Perkins, J. H. Schiff, James Stillman, N. Terhune, and Samuel Thorne.

President Hill took the chair.

The minutes of the Directors' adjourned meeting held at 27 Pine Street, New York, on the 15th November, were read, and on motion, duly seconded, were approved.

A form for the stock certificate of the Company was presented, and on motion, duly seconded, was referred to the Executive Committee, with power.

The By-Laws of the Company were presented and read, and on motion, duly seconded, it was

Resolved, That the By-Laws, as the same appear in the minutes, be, and they hereby are, approved and confirmed.

On motion, duly seconded, it was

Resolved, That the By-Laws be amended, and are hereby amended and supplemented so as to provide for the appointment by the Board, or by the Executive Committee, of two (2) or more additional Vice-Presidents and two (2) or more additional assistant treasurers, for the sole purpose of signing, on behalf of this Company, and if found necessary or desirable, of affixing this Company's corporate seal, to this Company's stock certificates; said officers to be under the direction, and their term of office to continue, during the pleasure of the President.

Resolved, Further, that the acts of such additional vice-presidents and assistant treasurers, in the signature and sealing of the said stock certificates, shall be deemed the act of this Company as fully, and with like effect, as if the same were done by the President and Treasurer of this Company.

On motion, duly seconded, it was

Resolved, That the Manhattan Trust Company of New York be, and is hereby, appointed Registrar of transfers of the stock of this Company.

On motion, duly seconded, it was

Resolved, That Mr. Nichols, Mr. Terhune and Mr. E. A. Bernholz be, and they hereby are, appointed Transfer Agents of the stock of this Company.

On motion, duly seconded, the meeting adjourned, subject to the call of the chair.

Secretary.

Minutes of a special meeting of the Board of Directors of the Northern Securities Company, held at its office, Nos. 27–29 Pine Street, New York City, at 11 o'clock A. M., November 29th, 1901. Said meeting was held in pursuance of a call of the President, a written agreement of Directors, and a notice to Director Robert Bacon and his acceptance of such notice, copies of which appear below:

"TO THE DIRECTORS OF THE NORTHERN SECURITIES COMPANY:

"A special meeting of the Board of Directors of said Company is hereby called, to meet at its offices, Nos. 27–29 Pine Street, New York City, at 11 o'clock A. M., on November 29, 1901, for the purpose of considering the approval of the rules of procedure of the Executive Committee, and such other business as may come before the meeting.

"Dated November 25, 1901.

"JAS. J. HILL,
"President.

"We, the undersigned, Directors of the Northern Securities Company, hereby waive notice of the meeting of the Directors,

to be held at Nos. 27–29 Pine Street, in the City of New York, at 11 A. M., November 29, 1901, and hereby assent that such meeting may be held at said time and place, without further notice.

"Dated November 25, 1901.

"JAS. J. HILL.
"JACOB H. SCHIFF.
"DANIEL S. LAMONT.
"GEO. W. PERKINS.
"GEO. C. CLARK.
"E. H. HARRIMAN.
"SAML. THORNE.
"JAS. STILLMAN.
"D. WILLIS JAMES.
"GEO. F. BAKER.
"JOHN S. KENNEDY.
"W. P. CLOUGH.
"EDWD. T. NICHOLS.
"N. TERHUNE."

To ROBERT BACON,
Director of Northern Securities Company:

A special meeting of the Board of Directors of said Company has been called by the President, to be held at its offices, Nos. 27–29 Pine Street, New York City, at 11 o'clock A. M., November 29th, 1901, for the purpose of considering the approval of the rules of procedure of the Executive Committee, and such other business as may come before the meeting. Please wire accepting notice.

Dated November 25th, 1901.

E. T. NICHOLS,
Secretary.

To NICHOLS, MORGAN, N. Y.: Nov. 28, 1901.

Received yesterday and hereby accept notice special meeting your letter dated lurdan.

ROBERT BACON.

Director Robert Bacon having been out of the City when such notice was given, the same was sent to him by the Secretary of the Company by telegraph, and his acceptance of notice, as appearing above, was sent by him by telegraph.

The following Directors were present at the meeting and participated in the proceedings thereof:

Geo. F. Baker.
Geo. C. Clark.
W. P. Clough.
Jas. J. Hill.
D. Willis James.
John S. Kennedy.
Daniel S. Lamont.
Edwd. T. Nichols.

Geo. W. Perkins.
Jacob H. Schiff.
N. Terhune.
Saml. Thorne.

Upon the request of the President, the Secretary read the minutes of all the meetings of the Board of Directors which had been held previously to this meeting; whereupon it was, by the affirmative votes of all the Directors present,

Resolved, that all the acts done and resolutions taken by the Board of Directors at the several meetings prior to the present be, and the same are, in all things approved, ratified and confirmed.

The Secretary then read the minutes of the proceedings of the Executive Committee held on November 27th, 1901, which minutes were as follows:

NORTHERN SECURITIES COMPANY.

Minutes of the first meeting of the Executive Committee of the Northern Securities Company, held at its offices in New York City at 1:30 P. M. on November 27th, 1901, in pursuance of an agreement of the members of the Committee waiving notice of the meeting of which the following is a copy:

"NORTHERN SECURITIES COMPANY.

"The subscribers, members of the Executive Committee of the said Company, hereby agree to hold a meeting of said Committee, for organization and for the transaction of such other business as may come before the Committee, at the offices of the Company, Nos. 27-29 Pine Street, New York City, at 1:30 P. M. on November 27, 1901.

"Dated November 25, 1901.

"JAS. J. HILL.
"E. H. HARRIMAN.
"D. WILLIS JAMES.
"GEO. F. BAKER.
"JOHN S. KENNEDY.
"W. P. CLOUGH."

All the members of the Committee were present and participated. On motion, the following rules regulating the procedure of the Committee were unanimously adopted:

NORTHERN SECURITIES COMPANY.

Rules of Procedure of the Executive Committee.

RULE I.

MEETINGS.

Meetings of the Executive Committee shall be held whenever called, in writing, by the Chairman or by any two other members of the Committee, at the offices of the Company in the City of New York, or at the offices of the Company in the State of New Jersey, the place of meeting to be stated in the call.

The Secretary of the Committee shall give notice of each meeting to each member of the Committee by delivery of such notice to the member personally, or by leaving the same for him at his usual place of business, on a business day previous to that fixed for the meeting; but such notice may be waived by any member of the Committee.

At any meeting at which every member of the Committee shall be present, even though without any notice, any business may be transacted.

RULE II.

OFFICERS.

The President of the Company, *ex officio*, and, in his absence, one of the members, in the order in which their names appear upon the list voted for by the Directors, at their election, shall act as Chairman of the Committee.

The Secretary of the Company, and, in his absence, one of the Assistant Secretaries, *ex officio*, shall be Secretary of the Committee, and, as such, shall keep accurate minutes of the proceedings of the Committee.

RULE III.

At all meetings of the Board of Directors of the Company, the Secretary of the Committee shall lay before the Board, for its approval or disapproval, the minutes of meetings of the Executive Committee held in the previous interval between meetings of the Board.

The Secretary then exhibited to the Committee the form of the Company's permanent stock certificate, which was as follows:

AUTHORIZED CAPITAL STOCK, $400,000,000.

No..... .....Shares.

NORTHERN SECURITIES COMPANY,

INCORPORATED AND REGISTERED UNDER THE LAWS OF THE STATE OF NEW JERSEY.

This Certifies That.....
is the registered holder of.....Shares of the Capital Stock of the Northern Securities Company of One hundred dollars each, transferable only on the books of the company by the holder hereof, in person or by duly authorized attorney, upon surrender of this certificate.

This certificate shall not become valid until countersigned by the transfer agent and also by the registrar of transfers.

In testimony whereof, the said company has caused this cer-

tificate to be signed by its President and Treasurer this .....
.....day of ....., A. D. 190.....

... .
President.

.....
Treasurer.

{ Countersigned this.....day
{ of....., A. D. 190....

....., Transfer Agent.

Countersigned and Registered this.....day of..... A. D. 190....

MANHATTAN TRUST COMPANY,
Registrar of Transfers.

By.....
Secretary.

Shares, $100 each.

On motion the said form was unanimously approved.

The Secretary of the Company reported to the Committee that he had obtained bids and models for the stock certificate from the American Bank Note Company and the International Bank Note Company, and had entered into a contract with the International Bank Note Company, their bid being the lowest, to engrave the plates for four denominations of stock certificates for $450, and to furnish stock certificates at the rate of $35 per book of 500 certificates, on the condition that the work shall be approved by this Company and be satisfactory to the New York Stock Exchange. On motion, duly seconded, the action of the Secretary in making this contract was approved.

On motion, duly seconded, the meeting adjourned.

Secretary.

On motion, the acts and resolutions of the Executive Committee at the said meeting were, by the affirmative vote of all the Directors present, approved and confirmed.

On motion, the meeting then adjourned to 3 P. M. on Tuesday, December 3d, at the Company's said offices.

Secretary.

Exhibit No. 3.

NORTHERN SECURITIES DIRECTORS.
22D JANUARY, 1903.

NEW YORK, January 22, 1903.

A meeting of the Board of Directors of the Northern Securities Company was held at the office of the Company, No. 26

Liberty Street, New York, N. Y., at 2.30 P. M., this day, pursuant to call.

Present: Messrs. Bacon, Baker, Clark, Clough, Harriman, Hill, James, Kennedy, Nichols, Perkins, Schiff, Stillman, Terhune and Thorne.

The President took the Chair.

The Secretary read the minutes of the meeting of the Board of Directors held December 9, 1902, which on motion duly seconded, were approved.

The Secretary reported that no meeting of the Executive Committee had been held since the last meeting of the Board of Directors.

The Secretary then read and placed before the Board, for its information, the Balance Sheet of the Company as at December 31, 1902.

The following correspondence between Mr. James J. Hill and this Company was then read:

"GREAT NORTHERN RAILWAY COMPANY,
32 Nassau Street,
NEW YORK, September 10, 1902.

THE NORTHERN SECURITIES COMPANY,
New York City.

DEAR SIRS: Having discussed with some of your Directors the advisability of the issuance of additional stock and the sale thereof, and after that discussion such issuance and sale having been deemed advisable, I hereby agree to lend to you at any time to January 1st, 1903, up to 75,000 shares stock of the Northern Securities Company for the purpose of making deliveries on account of such sales of said stock. Should such issuance and sale not be formally approved by your Directors, or Executive Committee, I agree to accept, in lieu of the return to me of such stock as you may borrow from me in terms of this letter, the proceeds that may be derived by you from the sale thereof, with interest on such proceeds from the date of their receipt by you to the date of their payment to me with interest at five per centum per annum.

It is understood that while any of said stock remains in your hands you will account to me and pay me any dividends that may be paid thereon and turn over to me any privileges that may accrue thereon.

It is understood and agreed that all the stock you may borrow from me on this agreement shall be returned to me or its proceeds be paid over to me as above provided, on or before February 1st, 1903.

Your acceptance of the terms of this letter will constitute a contract between us.

Yours very truly,
(Signed) JAS. J. HILL."

"NORTHERN SECURITIES COMPANY,
26 Liberty Street,
NEW YORK, September 10, 1902.

JAMES J. HILL, ESQ.,
32 Nassau Street, New York, N. Y.

DEAR SIR: We beg to acknowledge the receipt of your letter of September 10, 1902, agreeing to lend to us, on certain terms, up to 75,000 shares of stock of the Northern Securities Company.

We accept all the stipulations of your letter, and in the event of our borrowing from you any part of the 75,000 shares of said stock, we agree that such stock shall be subject to the terms of said letter.

Yours very truly,
(Signed) W. P. CLOUGH
4th Vice Prest.
(Signed) EDW. T. NICHOLS,
Secretary."

The President then explained that, in accordance with the agreement embodied in this correspondence, the Company had borrowed 62,000 shares of the Northern Securities Company stock, and that of said stock the officers of the Company had sold 59,346 shares in the open market at prices averaging nearly 112%, and applied the proceeds to extinguishing the indebtedness of the Company.

On motion, duly seconded, it was

Resolved, that the contract, dated Sept. 10, 1902, signed by the officers of this Company, on its behalf, with James J. Hill, by which Mr. Hill promised to lend to the Company shares of his stock, up to 75,000 in the aggregate, in order to assist the Company in procuring funds for repayment of loans, by sale of its shares in the open market, and also the sales of said borrowed stock, in said market, amounting to 59,346 shares, be, and the same are hereby, in all things approved, ratified, and confirmed.

Resolved, further, that the officers of this Company be, and they are hereby, empowered and directed to do all acts, and to execute all instruments, for and on behalf of this Company, necessary or proper for carrying into effect the provisions of said contract, including the issuance to Mr. Hill of 59,346 shares of the stock of this Company to replace the said shares so sold.

(*Exhibit 4.*)

KNOW ALL MEN BY THESE PRESENTS,

That EDWARD H. HARRIMAN and WINSLOW S. PIERCE of .....do hereby appoint James J. Hill, or in his absence, Edward T. Nichols, or in the absence of both,.....to be.....substitute and proxy for.....and in.....name and in.....behalf, to vote at the election of Directors of Northern Securities Company, or on any other business relating to said Company, at the Annual Meeting to be held in the City of Hoboken, N. J., on the 10th day of November, 1902, or at any postponement or adjournment thereof, as fully as we might or could if personally present, and we hereby revoke any other proxy heretofore given by us.

IN WITNESS WHEREOF, we have hereunto set our hands this 2d day of October, 1902.

(Signed) EDWARD H. HARRIMAN
(Signed) WINSLOW S. PIERCE

Witness present,
(Signed) ALEX. MILLAR

(*Exhibit 5.*)

KNOW ALL MEN BY THESE PRESENTS,

That.....of.....
.....do hereby appoint James J. Hill, or in his absence, Edward T. Nichols, or in the absence of both.....
.....to be.....substitute and proxy for.....
and in.....name and in.....behalf, to vote at the election of Directors of Northern Securities Company, or on any other business relating to said Company, at the Annual Meeting to be held in the City of Hoboken, N. J., on the 9th day of November, 1903, or at any postponement or adjournment thereof, as fully as.....might or could if personally present, and.....hereby revoke any other proxy heretofore given by.....

IN WITNESS WHEREOF, we have hereunto set our hands this 13th day of Oct., 1903.

(Signed) E. H. HARRIMAN
(Signed) WINSLOW S. PIERCE

Witness present,
(Signed) ALEX. MILLAR
(Signed) JOS. H. ALLEN

Statement of Attorney-General.

(*Filed Feb. 6, 1905.*)

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF MINNESOTA.

Third Division.

THE UNITED STATES OF AMERICA, Plaintiff, v. THE NORTHERN SECURITIES COMPANY, THE NORTHERN PACIFIC RAILWAY COMPANY, THE GREAT NORTHERN RAILWAY COMPANY, JAMES J. HILL, WILLIAM P. CLOUGH, D. WILLIS JAMES, JOHN S. KENNEDY, J. PIERPONT MORGAN, ROBERT BACON, GEORGE F. BAKER and DANIEL S. LAMONT, Defendants.	In Equity. No. 789.

UPON PETITION OF EDWARD H. HARRIMAN AND OTHERS FOR LEAVE TO INTERVENE.

STATEMENT OF THE ATTORNEY-GENERAL ON BEHALF OF THE UNITED STATES.

I respectfully submit to the Court that notice has been served upon me that Edward H. Harriman, Winslow S. Pierce, and the Oregon Short Line Railroad Company will apply to the Judges of this Court for leave to intervene in this cause and to proceed and be heard in respect of the execution of the final decree of this Court entered on April 9, 1903, as affirmed by the Supreme Court of the United States, and for such other or further or different order or relief as to the Court may seem meet.

The United States neither admits nor denies the allegations of the petition, but objects to the proposed intervention.

This case was heard by this Court on bill, answer, and testimony, and a final decree was entered, enjoining the defendants as therein recited. Upon appeal by the defendants to the Supreme Court of the United States, the decree of this Court was affirmed in every particular, the effect of which was to end and close the case.

The United States stands on the decree as affirmed, and submits that the Court is only concerned to see that it is faithfully observed by the defendants according to its terms.

P. C. KNOX,
Attorney-General.

Opinion.

(*Filed April 19, 1904.*)

CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF MINNESOTA,

Third Division.

UNITED STATES OF AMERICA

v.

THE NORTHERN SECURITIES COMPANY, THE NORTHERN PACIFIC RAILWAY COMPANY, THE GREAT NORTHERN RAILWAY COMPANY, JAMES J. HILL, WILLIAM P. CLOUGH, D. WILLIS JAMES, JOHN S. KENNEDY, J. PIERPONT MORGAN, ROBERT BACON, GEORGE F. BAKER and DANIEL LAMONT.

Mr. WILLIAM D. GUTHRIE, Mr. R. S. LOVETT, Mr. MAXWELL EVARTS and Mr. JOHN N. BALDWIN (Mr. JOHN F. DILLON was with them on the brief), for the petitioners.

Mr. ELIHU ROOT, Mr. JOHN G. JOHNSON, Mr. FRANK B. KELLOGG and Mr. C. A. SEVERANCE for the Northern Securities Company.

Hon. P. C. KNOX, Attorney-General, for the United States.

Before SANBORN, THAYER, VAN DEVANTER and HOOK, Circuit Judges.

THAYER, Circuit Judge, stated the conclusions of the Court.

This is an application by Edward H. Harriman and Winslow S. Pierce and the Oregon Short Line Railroad Company for leave to intervene *pro interesse suo* in the case of the United States *vs.* The Northern Securities Company and others. The case in which they seek to intervene has already passed to a final decree, and the decree has been affirmed lately by the Supreme Court of the United States.

The petitioners recite as the grounds of their application that Harriman and Pierce, as Trustees for the Oregon Short Line Railroad Company, are the registered owners of $82,491,871 in par value of the stock of the Northern Securities Company which was originally issued to them in exchange for common and preferred stock of the Northern Pacific Railway Company; that since the decree was affirmed by the Supreme Court the directors of the Securities Company have formulated a scheme for the reduction of the capital stock of that Company to the extent of ninety-nine per cent., and are about to submit the scheme for approval to the stockholders of the Company, that the plan so proposed contemplated that the stockholders of the Securities Company shall surrender ninety-nine per cent. of the stock of that Company which they respectively hold, each stockholder receiving in exchange $39.27 in stock of the Northern

Pacific Railway Company and $30.17 in preferred stock of the Great Northern Railway Company for each share of the Securities stock so surrendered; that the petitioners Harriman and Pierce are able to return the shares of stock in the Securities Company which they originally received from that Company in exchange for Northern Pacific stock; and, as they verily believe, that the proposed plan of distribution if carried out will vest a majority of the stock of the Great Northern and Northern Pacific Railway Companies in the same individuals who cooperated in forming the Securities Company and would continue the common management of the two competing railway companies and render the decree of this Court ineffectual and defeat its true purpose.

Applications for leave to intervene in a case, after the entry of a final decree, are very unusual.

They are never granted as a matter of course, and owing to the tendency of such applications to occasion delay and prolong the existing litigation, they ought not to be granted unless it is necessary to do so to preserve some right which cannot otherwise be protected or to avoid some complication that is liable to arise.

The principal ground as it seems on which the petitioners Harriman and Pierce base their application to intervene, is that it is necessary to the due enforcement of the decree that they should be admitted into the cause as parties and be allowed to raise further issues and obtain further orders.

It is undoubtedly true that a supplemental bill may be filed in a case after a final decree for the purpose of fully executing it, when, after the decree is entered, some action has been taken or unforeseen events have occurred which will prevent its enforcement unless some further orders or directions are given (*Root* v. *Woolworth*, 150 U. S. 401, 411; *Minnesota Company* v. *St. Paul Company*, 2 Wall. 609), but we fail to perceive that further orders are necessary in the case in hand to insure the due execution of the decree according to its terms. The decree was wholly prohibitory. It enjoined the doing of certain threatened acts, and so long as these acts are not done it enforces itself, and no further action looking to its enforcement is deemed essential. In its bill of complaint the United States prayed, among other things, for a mandatory injunction against the Securities Company requiring it to recall and cancel the certificates of stock which it had issued to surrender the stock of the two Railway Companies in exchange for which its stock had been issued. This prayer for relief was denied. The Court doubted its power to command stockholders of the Securities Company, who had not been served with process and were not before the Court otherwise than by representation (if indeed they were present by representation), to surrender stock which was in their possession and to take other stock in lieu thereof. It accordingly

contented itself with an order which rendered the stock of the two railway companies, so long as it was in the hands of the Securities Company, valueless for the purpose of carrying out the objects of the unlawful combination in restraint of interstate trade. The Government was satisfied with the relief which it obtained and expresses itself as fully satisfied therewith at the present time. When the decree was entered it was assumed by the Court that when the stock was thus rendered valueless in the hands of the Securities Company the stockholders of that Company would be able and likewise disposed to make some disposition of the stock which under all the circumstances of the case would be fair and just and would restore it to the markets of the world where it would have some value instead of being a worthless commodity. It was thought that the duty of thus disposing of it could be safely left to the stockholders of the Securities Company, and that if any controversy arose in the discharge of this function, in view of the situation that had been created by the decree, it would be a controversy that would properly form the subject matter of an independent suit between the parties immediately interested. It is true that the decree contained a provision in substance, that nothing therein contained should be construed as prohibiting the Securities Company from returning to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company any and all shares of stock in either of said railway companies which the Northern Securities Company had acquired in exchange for its own stock and that nothing therein contained should be construed as prohibiting the Securities Company from making such transfer of the stock aforesaid to such person or persons as had become the owners of its own stock originally issued in exchange for stock in the two railway companies. But this provision was merely permissive. It did not command that the stock should be so returned or exclude other methods of disposing of it that in view of all circumstances, might appear to be more equitable. The fact that the directors of the Securities Company have proposed to its stockholders a plan of distributing the stock of the two railway companies in a manner somewhat different from that which was tentatively suggested by the decree but not commanded, cannot be regarded as a failure to obey the decree. It was said in argument that one purpose of the intervention is to have that clause of the decree which is now merely permissive made mandatory. But this would be to modify the provisions of a decree which has now become final by affirmance and make an order which we expressly and on full consideration declined to make when the decree was entered. This we must decline to do.

The application for leave to intervene contains the further suggestion, made on information and belief only, that the proposed plan of disposing of the stock of the Northern Pacific

and Great Northern Railway Companies would result in leaving the control of the two railway companies in the hands of persons who co-operated in forming the Securities Company and that the petitioners should be permitted to intervene and obtain further orders to prevent such a result. The Securities Company meets this suggestion by the presentation of affidavits and excerpts from its record which tend to show that the proposed plan of distribution would not have the effect last mentioned but will lead to a very wide distribution of the stock of the two Companies, while the scheme which the petitioners have in view, if consummated by an intervention, will have the effect of placing the control of the Northern Pacific Railway Company in the hands of the owner of a parallel and competing road, to wit, the Union Pacific Railway Company. But the issues suggested by these affidavits and excerpts are disputed and debatable questions of fact which the party would be entitled to litigate with witnesses and evidence after leave to intervene had been granted and we decline to consider them or the affidavits or excerpts which present them upon this motion. We consider and determine this application upon the petition for leave to intervene alone. The United States is the complainant in this case. It is the conservator of a public welfare and has the right to speak for the public. According to well established rules the petitioners cannot intrude into this litigation merely to protect the public interest or as *amici curiæ*, so long as the Government is present by its Attorney General and expresses its disapproval of such intrusion. This would be wresting from the Government that control over the litigation, so far as the public is concerned, which it has the right to exercise. The petitioners can intervene only for the protection of their own individual interests and for that purpose only in the event that they can obtain adequate protection in no other way. The United States, speaking by its Attorney General, says that it " neither admits or denies the allegations of the petition but objects to the proposed intervention. This case was heard before this Court on bill, answer and testimony and a final decree was entered enjoining the defendants as therein recited. Upon appeal by the defendants to the Supreme Court of the United States the decree of this Court was affirmed in every particular, the effect of which was to end and close the case. The United States stands on the decree as affirmed and submits that the Court is only concerned to see that it is faithfully observed by the defendants according to its terms." In view of this declaration on the part of the United States it is to be presumed that the Government is disposed to permit the stockholders of the Securities Company to formulate some plan for equitable disposition of the stock of the two railway companies if they can do so, which will not be in violation of the law, feeling confident in its ability to dissolve any future combination in restraint of interstate commerce, should one in fact result in any scheme that

may be devised for the disposition of the stock of the two companies and preferring to challenge the validity of any such combination by an independent bill rather than by further proceedings in this case.

It was further contended in argument that the stock of the Northern Pacific and Great Northern Railway Companies now standing in the name of the Securities Company, was placed *in custodia legis* by the filing of the Government's bill in this case, that it has never been released from such custody, although a final decree has been entered, and that on this ground the petitioners, who assert a right to have particular shares of stock of the Northern Pacific Railway Company returned to them, are entitled to intervene. This argument does not impress us favorably. It may be conceded that so long as property remains actually in judicial custody any one asserting a right thereto or interest therein may intervene, although the case in virtue of which judicial custody was acquired has passed to a final decree. *In Matters of Howard*, 9 Wall. 175, 184, and cases cited, *Williams* v. *Morgan*, 111 U. S. 684. It is a well-settled doctrine that when a court has acquired the custody of property, persons who assert an interest therein have a right to apply to that court for relief, and as a general rule cannot obtain relief elsewhere. This Court, however, has never assumed the custody of the stock of the Northern Pacific and Great Northern Companies, but has studiously refrained from so doing.

It did not assume to direct what should be done with the stock in question when it enjoined the Securities Company from voting it and the railway companies from paying dividends thereon to the Securities Company. Nor was the bill, which was filed by the Government, one that placed the stock in judicial custody when it was filed. It was a proceeding strictly *in personam* which prayed the Court to enjoin the use of the stock for the accomplishment of certain unlawful objects and the relief granted was confined to that end. The intervention cannot be allowed on the grounds last stated. Our conclusion is that the petitioners should not be allowed to intervene and import into the case new issues to be tried. The due enforcement of the decree does not necessitate such action and if it so happens that the decree of this Court in favor of the Government creates a situation which shall give rise to controversies between stockholders of the Securities Company as to how the holdings of that company in the two railway companies ought to be distributed or what should be done with such holdings, these are questions which can be settled among the stockholders themselves, who are immediately concerned in these questions, and according to those principles of law and equity which any court having general common law and equity powers, is competent to enforce.

Leave to intervene is denied.

Order denying application

(Filed April 19, 1904.)

UNITED STATES CIRCUIT COURT

FOR THE DISTRICT OF MINNESOTA,

Third Division.

UNITED STATES OF AMERICA vs. THE NORTHERN SECURITIES COMPANY *et al.*	C. Equity No. 789.

Mr. William D. Guthrie, Mr. R. S. Lovett, Mr. Maxwell Evarts and Mr. John N. Baldwin (Mr. John F. Dillon was with them on the brief) for the petitioners.

Mr. Elihu Root, Mr. John G. Johnson, Mr. Frank B. Kellogg and Mr. C. A. Severance for the Northern Securities Company.

Hon. P. C. Knox, Attorney General, for the United States.

Before SANBORN, THAYER, VAN DEVANTER and HOOK,
Circuit Judges.

The application of Edward H. Harriman, Winslow S. Pierce and the Oregon Short Line Railroad Company for leave to intervene *pro interesse suo* in this case was heard before this court on April 12th and 13th, 1904, and after due consideration,

It is hereby ORDERED that the said application be, and the same is hereby denied.

ST. PAUL, April 19, 1904.

WALTER H. SANBORN,
AMOS M. THAYER,
WILLIS VAN DEVANTER,
WILLIAM C. HOOK,
Circuit Judges.

Clerk's Certificate.

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF MINNESOTA.

Third Division.

THE UNITED STATES OF AMERICA, Complainant, vs. THE NORTHERN SECURITIES COMPANY, THE NORTHERN PACIFIC RAILWAY COMPANY, THE GREAT NORTHERN RAILWAY COMPANY, JAMES J. HILL, WILLIAM P. CLOUGH, D. WILLIS JAMES, JOHN S. KENNEDY, J. PIERPONT MORGAN, ROBERT BACON, GEORGE F. BAKER and DANIEL S. LAMONT, Defendants.	In Equity No. 789.

UNITED STATES OF AMERICA,
District of Minnesota,
Third Division. } Sct.

I, HENRY D. LANG, Clerk of the Circuit Court of the United States for the District of Minnesota, do hereby certify that I have carefully compared the foregoing paper writings, to wit:

Petition for leave to intervene and notice of presentation.
Affidavit of Edward T. Nichols.
Affidavit of J. J. Hill.
Verified minutes of Northern Pacific Ry. Co.
Verified minutes of Northern Securities Company.
Statement of Attorney General.
Record of hearing on petition for leave to intervene, Apl. 12.
Record of hearing on petition for leave to intervene, Apl. 13.
Opinion of Court.
Order denying application of Harriman and others for leave to intervene,

in the above entitled cause, with the originals thereof, which are in my custody as such clerk, and that the said paper writings are correct copies of such originals and of the whole thereof, in the cause therein named.

Witness my hand as Clerk and the seal of said Court. Done at my office in Saint Paul, Minnesota, this 7th day of February, A. D. 1905.

HENRY D. LANG,
Clerk.

[SEAL.]

No. 512.

In Chancery of New Jersey.

Between THE CONTINENTAL SECURITIES COMPANY,
Complainant,

AND

THE NORTHERN SECURITIES COMPANY,
Defendant.

On Bill for Injunction 354 and Relief.

Opinion.

CHARLES E. THOMPSON, ESQ., for the Complainant. JOHN W. GRIGGS, ROBERT H. MCCARTER, CHARLES L. CORBIN and THOMAS THATCHER, for the Defendant.

On Rule to Show Cause why an injunction should not issue.

BERGEN, V. C.

Stated as concisely as the matters under consideration will permit, it appears from the bill of complaint, affidavits and exhibits offered and used, by consent, on the hearing, that the defendant was lawfully incorporated under the laws of this State; that the objects for which it was formed, as set forth in its certificate of incorporation, was the purchase, holding and selling of the bonds, evidences of indebtedness or capital stock of other corporations, whether incorporated in this State or elsewhere, and as owner thereof, to exercise all the rights,

powers and privileges of ownership, including the right to vote on any such stock; that shares of the capital stock of the defendant corporation of the par value of one hundred dollars each, to the extent of 3,954,000 shares were issued and disposed of; that of the stock so issued, a large proportion was used in purchasing a majority of the capital stock of the Northern Pacific Railway Company, and also of the Great Northern Railway Company, by virtue of which the defendant company assumed the management and control of the Railway Companies; that the defendant company purchased 1,537,594 shares of the common stock, and 410,850 shares of the preferred stock of the Northern Pacific Company, paying therefor in cash $43,625,036.50, and 1,768,229 shares of its own stock; that it purchased of the capital stock of the Great Northern Railway Company 1,181,242 shares, paying therefor $1,707,200 in cash and 2,110,576 shares of its own stock; that the defendant issued and sold of its own stock 75,220 shares to the public for cash; that in January, 1902, the preferred stock of the Northern Pacific Railway Company, held by the defendant, was called for payment, by that company, and paid in cash, for which the defendant received $41,035,000 of which it invested $34,709,062.50 in the convertible bonds of the Northern Pacific Company, afterward availing itself of the convertible rights vested in the owner of any such bond, the defendant surrendered said bonds to the Northern Pacific Company, and received from it the equivalent in shares of the common stock of said company issued to redeem the bonds. It is thus disclosed that the capital stock of the defendant company was issued in part for the common stock of the two Railway Companies, which we may assume, for the purposes of this motion, was an exchange of stocks with differences paid in cash; that stock of the defendant company worth at par $7,522,000 was sold in the public market for cash; that a large amount of common stock of the Northern Pacific Company now owned by the defendant, was issued by the Northern Pacific Company directly to it, for the surrender of convertible bonds belonging to the defendant company.

It further appeared that a suit brought by the United States against the defendant company, based upon an alleged violation of the act of Congress, commonly known as the "Anti Trust" act had resulted in a decree, afterward affirmed

by the Supreme Court of the United States, adjudging that the defendant had entered into a combination in restraint of trade and commerce among the several states, which the act of Congress denounced as illegal; that all of the stock of the Northern Pacific Railway Company, and all the stock of the Great Northern Railway Company, claimed to be held and owned by the defendant, was acquired and held by virtue of such illegal combination, and upon such adjudication enjoined the Northern Securities Company, or its representatives, from acquiring or attempting to acquire any further stock in either of said Railway Companies, and prohibiting the defendant from voting, or attempting to vote said stock at any meeting of the stockholders of either of said Railway Companies, and from exercising, or attempting to exercise any control, direction, supervision or influence whatsoever, over the acts and doings of said Railway Companies, or either of them, by virtue of its holding any stock therein, or from voting at any corporate election for directors or officers of either of said companies; and said decree further enjoined the said Railway Companies from paying any dividends to this defendant, on account of any stock which it claimed to hold or own of either of said companies, and prohibited the said Railway Companies, from permitting the defendant to exercise any control over their corporate acts. The said decree adjudges that nothing in it contained, should be construed as prohibiting this defendant from returning and transferring to the stockholders of either of said Railway Companies, any and all shares of stock in either of said companies, which the Northern Securities Company might have theretofore received from said stockholders, in exchange for its stock, or as prohibiting the defendant from making transfer of the stock to such persons as might then be the holder of its own stock, originally issued in exchange or payment for stock acquired by it in the aforesaid Railway Companies.

It further appeared that the continued ownership of said Railway stocks by the defendant company, would not only be useless, but a great disadvantage to the stockholders of the company, and that the directors of the company had decided to reduce its capital stock, and divide the surplus that would arise upon such reduction, between the stockholders, and in order to carry out said determination, on the 22nd day of

March, 1904, adopted certain resolutions for that purpose, those pertinent to this issue, being as follows :

> " *Resolved*, In consideration of the premises, it is " declared necessary and desirable for this Company so " to reduce its present capital stock as will enable it " without delay, in connection with such reduction, to " distribute among its shareholders, the shares of cap- " ital stock of said railroad companies held by it.
>
> " *Resolved*, That the Board of Directors of this com- " pany hereby declare it advisable that Article Fourth " (4th) of this Company's Certificate of Incorporation " be amended so as to read as follows :
>
> " FOURTH, The capital stock of this Company is " hereby reduced to three million nine hundred fifty-four " thousand dollars ($3,954,000) divided into thirty-nine " thousand five hundred and forty (39,540) shares of one " hundred dollars each ($100). Such reduction of capi- " tal stock shall be accomplished by each holder of out- " standing shares of this Company's stock, surrendering " to the Company, for retirement, ninety-nine percentum " (99) of the shares held by him."
>
> " Upon the surrender to this Company by any share- " holder of the entire number of shares, and parts of " shares of this Company's stock, which he is hereby " required to surrender, this Company will assign to " him, for each share so surrendered, thirty-nine dollars " and twenty-seven cents ($39.27) of the stock of the " Northern Pacific Railway Company, and thirty dollars " and seventeen cents ($30.17) of the preferred stock of " the Great Northern Railway Company, and propor- " tional amounts thereof for fractional shares of the " stock of this Company."

And on the same day the said directors called a special meeting of the shareholders of the defendant company, to vote upon said resolutions and upon such other business as might be brought before said meeting. That the requirements of the statute, regarding the holding of the special meeting, have been complied with, is not disputed, but the lawful right of the stockholders to approve, and of the directors to carry out the

distribution of surplus as proposed, is questioned, and the Court is asked to enjoin the stockholders from meeting, and passing upon the resolutions proposed by the directors as aforesaid, and the directors from carrying it out, if approved.

The corporation act of this State very clearly and distinctly defines the method to be pursued by a corporation desiring to reduce its capital stock ; it is not disputed but that the proceedings taken in the present instance, have followed the statutory directions, so that the asking of the Court to enjoin the meeting of the stockholders, is a mere incident to the real question, which is the prohibiting of the directors of this company, from dividing the surplus in the manner proposed, for if the action of the stockholders at the special meeting, should be the approval of the proposed reduction of capital stock, the result would be, if carried out, the creation of a large surplus of assets. Before the Court will allow an injunction order to restrain a corporation from distributing surplus assets, on the prayer of a complaining stockholder, it should be satisfied that the complainant is entitled to the relief he asks on the case presented.

The able and ingenious argument of the complainant's counsel, rested largely upon the contention that the decree of the Supreme Court of the United States, above recited, not only prevents the distribution of the surplus assets, in the manner proposed, but goes further, and requires that the defendant company shall transfer to the original stockholder, or his transferee, the same stock which was delivered in exchange for the defendant's stock. I am very clear that the decree of the Supreme Court will not bear any such construction; it controls the action of these defendants, only so far as the holding of the stock, and the exercise of such powers as the ownership of stock in a corporation usually confers, may be in violation of the act of Congress with regard to Interstate commerce, and that the statement or proviso in the decree that nothing in it contained should interfere with the transfer of the stock to the stockholders of either of the Railway Companies, any stock which the defendant might have received from stockholders in exchange for its stock, is not a direction that it shall transfer it in any particular method or form, but is added to the decree to avoid the possible construction that the stock could not be returned to the original holders if it was wise or possible to do

so. There is no doubt about the character of the original transaction; it was intended to be, and was, a sale of stock to the defendant company, with every *indicia* of ownership and title; the purchaser was not bound to retain one share of the stock, it had the right to sell any or all of it, and invest the proceeds in other securities, and did so in the case of the preferred stock of the Northern Pacific Company; upon such sale and delivery, the stock of the two Railway Companies became the assets of the defendant company, upon which the value of its stock depended. Large quantities of the capital stock of the defendant have been sold in the open market to purchasers who had a right to rely upon the well known character of the assets of this company, as a protection to their investment, and it would not make the slightest difference, whether the stock in one instance was originally issued for cash, and in another, in exchange for the stock of the two Railway Companies, the cash and the stock are the common assets of the company, and each stockholder is entitled to the benefit of all of the assets of the corporation, whose stock they hold, and if a division of the surplus is to be made, from securities held as assets, every stockholder is entitled to have his proportionate share of each class, where there is a possible or probable difference in market value.

The complainant also contends that as the purpose for which the stock was acquired, has been adjudged to be unlawful, the transfer and sale of the stock was void *ab initio*, that no title passed, and upon surrender of the stock of the defendant company, the original holder, or his transferee, is entitled to demand and have the identical stock he sold or transferred to the company returned to him. If this insistment of the complainant is sound, he does not show what property he is entitled to have returned, for all that appears to the Court at present, his stock may belong to the class that was sold for cash, in which case he would have no ground to complain, for he is getting his equitable portion of the assets of the company, be they worth more or less, but in my judgment, he would not be entitled to the relief he seeks, if he had been able to show that his stock was originally issued to one who had turned over to the defendant company, stock in either of the two Railway Companies, for if the original stock was issued for an unlawful purpose, the person who paid the con-

sideration, and who accepted the stock, was one of the conspirators, and can hardly ask the aid of a Court of Equity, to restore to him, property which he contributed to an illegal enterprise—he must abide the consequences of his own act. To permit the originators of an unlawful scheme, or their successors in title, to withdraw from the property of the company, a special class of assets, and leave as security for the unoffending stockholder, such assets as might remain, as a security for his investment, is inequitable. This corporation is not to be dissolved, it holds many valuable securities, other than the stocks of these two Railway Companies and expects to continue business, and might, so far as I can see, sell all of these stocks, the holding of which had become unprofitable, and divide the cash among the stockholders, or invest it in other proper securities. It seems to me, that the only question on this branch of the case is, what is the character of the title by which the defendant corporation holds these stocks. I am satisfied from the evidence before me, that the stocks were sold and conveyed without reservation, to the defendant, and that its directors might sell all of one class of stock, and hold the other, and that each stockholder would then have a joint interest in the stock retained, as well as in the cash. If one class of assets had depreciated in value, and the other had increased in worth, during such ownership, would it be seriously contended that a favored class of stockholders could take the valuable assets, and leave the depreciated to satisfy the other stockholders? I think not. Stockholders are, in a sense, partners, and the property of the firm belongs jointly to all. No trust was created when the stocks were transferred, at least, none was announced to the public when the stock was offered for sale, or shown on this hearing, and a secret trust, if now disclosed, would not be sustained, at least, against such stockholders as are not subject to its protection.

The complainant further argues, that the law under which the defendant was organized, while permitting a reduction of stock, does not provide for a distribution of a portion, and the retention of the balance of the assets as the property of the corporation. The suggestion that a corporation cannot retain a portion of its assets, to represent the capital stock after reduction, is without merit, otherwise every reduction of capital would require a distribution of all

the property of the company, and thereby in effect, work a dissolution of the corporation.

By the reduction of the capital stock of a corporation, not impaired by losses, there must necessarily occur a surplus of assets to the extent of the reduction, and unless the rights of creditors will be affected thereby, or the capital impaired, it becomes the duty of the directors to make an equitable distribution of such surplus, or of so much thereof as the carrying on of the business for the best interest of the stockholders, may not require. Strong vs. Brooklyn R. R. Co., 93 N. Y. 426. Williams vs. Western Union Tel. Co. 93 N. Y. 163. Morawetz on Corporations 443. The proposed distribution is not a dividend in the sense intended by the statute, but a division of surplus capital rendered useless for the purpose usually attributed to capital, because the issue of stock which it represented has been cancelled.

The right to distribute the surplus having been determined, the question arises, can the directors distribute securities in which such surplus is invested, or must it be reduced to cash? In this case, the character of the assets make an equitable division easy to accomplish, each share of the stock to be assigned to a stockholder in the manner proposed has an equal market value, if there is a difference in value between the two classes, or the value of one is subject to greater fluctuations than the other, each shareholder gets an equal proportion of the fat and the lean, and in view of the possibility that a peremptory sale of this stock, amounting to over three hundred millions of dollars, would be attended with disastrous results to the stockholders of this company, it would seem that the best interests of the shareholders, require that a division of the stock of the two Railway Companies be made between them, unless prevented by some imperative legal rule; no such rule exists, on the contrary, the power of directors of a corporation to divide property other than money, among the shareholders, is sustained by abundant authority. 9 Amer. & Eng. Enc. of Law, 2 Ed. 695; Ehle vs. Chittenango Bank, 21 N. Y. 548; Leland vs. Hayden, 102 Mass. 542.

Having determined that the stock of the two Railway Companies constitutes a part of the assets of the defendant company, in which, or in its proceeds, each shareholder has a

vested interest to the extent of his holdings of the defendant company's stock; that when the capital stock of a corporation is reduced and a surplus of assets results, it becomes the duty of the directors to divide such surplus as is not required for the use of the company, among the stockholders; that a division of property, as distinguished from cash, is lawful; that each shareholder is entitled to his proportionate share of each class of property, so held for distribution, and that the proposed method of division is equitable, it is clear that the complainant has shown no equity upon which to base its claim for the restraining order of a Court of Equity. Whether this complainant would be entitled to equitable relief in any phase of the case, is extremely doubtful; I must take the bill of complaint as stating complainant's position correctly, and it is there alleged that notice of the action of the directors on this subject, together with the call for a special meeting for its approval was issued on the 22nd day of March, 1904, and that after that, and on the 28th day of March following, the complainant went into the market and bought five hundred shares of defendant's capital stock; manifestly he bought such stock with knowledge of the proposed action of the directors and stockholders and thereupon immediately filed his bill of complaint in this cause. But one inference can be properly deduced from his conduct, and that is, that he bought this stock with the fixed purpose of harassing the directors of the company, and its stockholders, and to hinder and delay them in carrying out a proposition for the adjustment of the affairs of the company, made necessary by the restrictive order and decree of the United States Court, and to delay the stockholders of the defendant company (many of whom had nothing to do with the origin of the scheme, afterwards declared unlawful) in the receipt of dividends or income from their investment.

The rule to show cause will be discharged.

FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 512.

EDWARD H. HARRIMAN ET AL., PETITIONERS,

vs.

NORTHERN SECURITIES COMPANY.

PROCEEDINGS IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

And afterwards, to wit, on the ninth day of November, A. D. 1903, this cause being called for argument on the transcript of record from the circuit court of the United States for the district of New Jersey, before Hon. M. W. Acheson, Hon. George M. Dallas, and Hon. George Gray, circuit judges, and being argued by counsel for the respective parties, and the court, not being fully advised in the premises, takes further time for consideration thereof.

And afterwards, to wit, on the third day of January, A. D. 1905, comes the parties aforesaid, by their counsel aforesaid, and the court, now being fully advised in the premises, renders the following opinion by Dallas, circuit judge, and Gray, circuit judge, dissenting.

(Opinions already printed.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1904.

NORTHERN SECURITIES COMPANY, *Appellant*, *vs.* EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY, AND THE EQUITABLE TRUST COMPANY OF NEW YORK.	No. 52.

Appeal from the Circuit Court of the United States for the District of New Jersey.

This cause came on to be heard on the transcript of record from the circuit court of the United States for the district of New Jersey, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, reversed with costs.

(Signed) GEO. M. DALLAS,
Circuit Judge.

PHILADELPHIA, *January* 4, 1905.

UNITED STATES OF AMERICA, *ss.*:

I, William H. Merrick, clerk of the United States circuit court of appeals for the third circuit, do hereby certify the foregoing pages (date of argument, majority opinion of the court and dissenting opinion, and decree) to contain a full, true, complete, and faithful copy of the proceedings of this court in the case of The Northern Securities Company, appellant, and Edward H. Harriman, Winslow S. Pierce, Oregon Short Line Railroad Company, and The Equitable

Trust Company of New York, appellees, on file and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this twenty-fourth day of January, in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States the one hundred and twenty-ninth.

[SEAL.] WM. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

FILE COPY.

Office Supreme Court U. S.
FILED
JAN 23 1905
JAMES H. McKENNEY,
Clerk.

No. 512.

Supreme Court of the United States,

OCTOBER TERM, 1904.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY AND THE EQUITABLE TRUST COMPANY OF NEW YORK,
Petitioners,

versus

NORTHERN SECURITIES COMPANY impleaded with NORTHERN PACIFIC RAILWAY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND NOTICE OF PRESENTATION.

JOHN F. DILLON,
D. T. WATSON,
R. V. LINDABURY,
WILLIAM D. GUTHRIE,
R. S. LOVETT,
MAXWELL EVARTS,
BAINBRIDGE COLBY,
Of counsel for petitioners.

January 14, 1905.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY and THE EQUITABLE TRUST COMPANY OF NEW YORK,

Petitioners,

versus

NORTHERN SECURITIES COMPANY impleaded with NORTHERN PACIFIC RAILWAY COMPANY,

Respondent.

NOTICE OF PETITION FOR CERTIORARI.

Notice is hereby given that under and by virtue of the provisions of section 6 of the Judiciary Act of March 3, 1891, the undersigned, on behalf of the petitioners above named, will present the annexed petition for a writ of certiorari upon the record in the above entitled cause to the Supreme Court of the United States, at the Capitol in the city of Washington, on Monday, the 23d day of January, 1905, at the coming in of the court on that day, or as soon thereafter as counsel can be heard.

Dated, New York, January 14, 1905.

JOHN F. DILLON, WILLIAM D. GUTHRIE,
D. T. WATSON, R. S. LOVETT,
R. V. LINDABURY, MAXWELL EVARTS,
BAINBRIDGE COLBY,

of counsel for petitioners.

TO JOHN G. JOHNSON, JOHN W. GRIGGS, ELIHU ROOT and FRANCIS LYNDE STETSON, ESQS.,

of counsel for respondent.

Due and sufficient service of notice of the submission of the annexed petition is hereby admitted.

JOHN W. GRIGGS,

Counsel for respondent.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY and THE EQUITABLE TRUST COMPANY OF NEW YORK,

Petitioners,

versus

NORTHERN SECURITIES COMPANY impleaded with NORTHERN PACIFIC RAILWAY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners above named, Edward H. Harriman, Winslow S. Pierce, Oregon Short Line Railroad Company and The Equitable Trust Company of New York, respectfully present this their petition for a writ of certiorari to be directed to the Circuit Court of Appeals for the Third Circuit requiring said court to certify to this court for review and determination the record in that court of the decree and proceedings in the suit in equity now pending in the Circuit Court of the United States for the district of New Jersey brought by said petitioners as complainants against the Northern Securities Company and the Northern Pacific Railway Company as defendants, in which suit a decree has been entered by said Circuit Court of Appeals reversing an interlocutory decree or injunction order of the Circuit Court. The case is one where the judgment of the Circuit Court of Appeals is made final by section 6 of the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 826, and the subject matter of the litigation is about to be dissipated, so that

the petitioners are remediless save by the issue of a writ of certiorari by this Honorable Court.

The present suit arises out of the decision of this court rendered at the last term in the case of *Northern Securities Company* v. *United States*, 193 U. S. 197, hereinafter, for convenience, called the "Government suit," and it was brought to determine the right of possession of certain shares of the capital stock of the Northern Pacific Railway Company delivered to the Northern Securities Company in November, 1901, by the complainants Harriman and Pierce[1] and now held by the Securities Company, being a portion of the same railway shares directly involved in and covered by the decree in said Government suit. Such decree was in all things affirmed by this court, and adjudged as follows (193 U. S. at p. 255; present record, p. 191):

> "That the defendants above named have heretofore entered into a combination or conspiracy in restraint of trade and commerce among the several States, such as an act of Congress, approved July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies' denounces as illegal.
>
> "That *all* of the stock of the Northern Pacific Railway Company and *all* the stock of the Great Northern Railway Company, now *claimed* to be held and owned by the defendant, the Northern Securities Company, *was acquired and is now held* by it in virtue of such combination or conspiracy in restraint of trade and commerce among the several States.
>
> "That the Northern Securities Company, its officers,

[1] Messrs. Harriman and Pierce are trustees for the Oregon Short Line Company, which, in November, 1901, was the holder and owner of a majority of the capital stock of the Northern Pacific Railway Company (pp. 4–5, 198). The Equitable Trust Company of New York is the pledgee of the Securities Company's certificates (pp. 6, 39, 200).

agents, servants and employees, be and they are hereby enjoined from acquiring or attempting to acquire further stock of either of the aforesaid railway companies.

"That the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire, and from voting at any meeting of the stockholders of either of the aforesaid railway companies, and from exercising or attempting to exercise any control, direction, supervision or influence whatsoever over the acts and doings of said railway companies or either of them by virtue of its holding such stock therein. . . .

"But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring *to the stockholders*[1] of the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said the Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

Immediately upon the rendition of such decision by this court, the board of directors of the Northern Securities Company adopted a resolution alleging that the "company desires and intends to comply with the decree in the said suit, fully and unreservedly, and without delay" and to terminate the company's holding of stock of the Northern Pacific and Great North-

[1] So in original decree, but omitted through mistake in 193 U. S. 256.

ern Railway Companies by distributing such holdings among its stockholders,[1] and thereupon advised the Attorney-General of the United States in writing that the company contemplated "a speedy dissolution, but it is deemed by the directors unwise to bring this about until after it has divested itself of the shares of said Northern Pacific and Great Northern Railway Companies' stock by a distribution of the same, ratably, among the stockholders."[2] The distribution of the stock of the two railway companies which the directors of the Northern Securities Company thus proposed to make was not to return to the original depositors or their assigns the stock deposited by them or represented by their certificates, as was expressly authorized by the final decree in the Government suit, but upon the basis that, notwithstanding the adjudged illegality of the contract of acquisition and holding of the railway shares and the company's adjudged lack of power to exercise any of the beneficial rights of ownership over them, it had nevertheless become the legal and equitable owner thereof as fully as if such contract had been legal. Under such proposed distribution, every stockholder was to receive a proportionate amount of the stock of each of the two competitive railway companies and not what he originally deposited, and would thus continue to be jointly interested as stockholder in both corporations.

Your petitioners, as original holders of certificates representing $82,491,871 par value of the capital stock of

[1] Record, pp. 10–12.
[2] Record, p. 202.

the Northern Securities Company, promptly objected to such proposed method of distribution, and thereupon, after first applying to the Circuit Court of the United States for the district of Minnesota for leave to intervene in the Government suit,[1] instituted the above mentioned suit in said Circuit Court of New Jersey as complainants for the purpose of having it adjudicated that the proposed plan of distribution was illegal and inequitable. They averred that such plan of distribution would give effect to and consummate the illegal contract of acquisition in violation of their rights. They further averred that, as original depositors of shares of stock of the Northern Pacific Railway Company with the Northern Securities Company upon a contract which had wholly failed of consideration by reason of the illegality of the enterprise and the decree in the Government suit, they were entitled to the return and re-transfer to them of their original property which they were able to trace and identify in the hands of the Northern Securities Company in exchange for, and on the return to the Northern Securities Company of, the certificates of stock issued to the complainants Harriman and Pierce, as trustees, in November, 1901, and the $8,915,629 of cash received by them at the same time.

Your petitioners further averred that they were still the holders of the original and identical certificates issued to them in November, 1901,[2] which they offered to bring into court,[3] that the Securities Company

[1] 128 Fed. Rep. 808.
[2] Record, pp. 5, 14–15.
[3] Record, p. 14.

held the very Northern Pacific shares which had been transferred to it by them or the shares into which they had been converted,[1] that the objects and purposes for which the Northern Securities Company was organized had wholly failed and were being abandoned,[2] that all parties to whom stock of the Northern Securities Company had been issued received it with full knowledge of the objects and purposes for which it was organized,[3] and that it was practicable to trace and identify all the railroad stocks and return to the original depositors or their assigns exactly what each had transferred to or deposited with the Securities Company.[4]

As the Northern Securities Company was threatening immediately to distribute and transfer the 717,320 shares of Northern Pacific stock claimed, traced and identified by the complainants, and as the proposed distribution and transfer would have dissipated the subject-matter of the litigation and denuded the company of ninety-nine per cent. of its assets, and would thus have completely frustrated the object of the suit and have rendered unavailing any final decree that might be rendered in favor of the complainants, an application was made to said Circuit Court of New Jersey for a preliminary injunction to preserve the *status quo* and restrain the defendant Northern Securities Company from disposing of the Northern Pacific stock claimed by the complainants until the cause could proceed to a final hearing on pleadings and proofs. Both of the defend-

[1] Record, p. 6.
[2] Record, pp. 10–12.
[3] Record, p. 4.
[4] Record, p. 13.

ants were duly served.[1] A temporary restraining order was granted by the late District Judge Kirkpatrick, sitting as Circuit Judge, under section 718 of the Revised Statutes.[2] The motion for a preliminary injunction thereafter came on to be heard before District Judge Bradford, sitting as Circuit Judge, and was heard on the complainants' verified second amended bill of complaint and numerous *ex parte* affidavits on their behalf as well as on numerous *ex parte* affidavits on behalf of the defendant Northern Securities Company, which latter affidavits controverted material allegations of the bill and complainants' affidavits. At the time the motion for an injunction was heard and decided, no pleading had been filed on behalf of the defendant Northern Securities Company, and none was served until after the perfecting of the appeal hereinafter mentioned, when an answer was filed in the office of the clerk of the Circuit Court on September 3, 1904, to which a replication was duly filed. The answer and replication, however, were not before the Circuit Court of Appeals, and are not, therefore, in the record now presented.

Your petitioners further show that the Circuit Court granted a preliminary injunction restraining until final hearing the transfer of the Northern Pacific stock claimed and identified by the complainants as originally belonging to them, and held that the defense controverted material allegations of the bill,

[1] Supplemental record, pp. 1, 2.
[2] Record, p. 195.

that the affidavits and exhibits were conflicting on substantial points, that the case was not ready for a final decision, that grave and doubtful questions of law were involved, that the sole object for which the injunction was sought was the maintenance of the *status quo* until the question of right between the parties could be decided on final hearing, that the denial of a preliminary injunction would, if the complainants ultimately prevailed, render barren their victory so far as relief in the suit was concerned, that the affidavits were also conflicting on the question whether or not the nature and amount of the consideration for the issue or transfer of stock of the Securities Company could be traced and identified on its books or otherwise, and that it was manifestly improper that these matters should be decided on the fragmentary and inconclusive evidence then before the court. The opinion of Judge Bradford is submitted herewith, and is also printed at length in the record at pages 395–422.

The injunction order granted by the trial court was limited expressly to the Northern Pacific stock claimed and identified by the complainants, and as stated by the learned judge of the Circuit Court in his opinion,[1] the complainants expressly disclaimed all right to any stock of the Great Northern Railway Company which the Northern Securities Company then held. Hence, the effect of the injunction order was confined solely to the 717,320 shares of the capital stock of the Northern Pacific Railway Company representing the original property of

[1] Record, p. 421.

the complainant Oregon Short Line Railroad Company, and left the Northern Securities Company at liberty to dispose of or distribute the remaining Northern Pacific stock, constituting a majority thereof, as well as all its holdings of Great Northern stock, constituting more than ninety-five per cent. thereof.

The complainants, on the granting of the preliminary injunction, gave a bond in the penal sum of $2,000,000[1] to cover all possible damages which the Northern Securities Company might sustain; the sufficiency of the bond was not challenged; the responsibility of the sureties was admitted;[2] and the complainants stood ready and willing and offered in the court below to increase the bond if required.

The defendant Northern Securities Company appealed to the Circuit Court of Appeals for the Third Circuit, and said court reversed the injunction order, holding in effect that, although the Circuit Court did not abuse its discretion in maintaining the *status quo* until a hearing on the merits, nevertheless a complete adjudication on the merits of the entire controversy should then be made by the appellate court, and, proceeding to so adjudicate, the majority of the court held that the Northern Securities Company had become the absolute legal and equitable owner of the railway shares acquired and held by it in pursuance of the illegal combination condemned by the final decree of this court in said Government suit, and that the question of ownership was not involved or decided or even inci-

[1] Record, p. 424.

[2] Record, p. 426.

dentally passed upon by this court in that suit. Circuit Judge Gray dissented on the ground that the Circuit Court had exercised a sound judicial discretion in granting the motion for a preliminary injunction, for the reason that a *prima facie* case had been established at the hearing, which entitled the complainants to the protection of such an injunction and an opportunity to have the controversy heard and determined according to the ordinary practice in equity on pleadings and proofs. Copies of the opinions of the judges of the Circuit Court of Appeals are submitted herewith.

Your petitioners aver that such decision of the Circuit Court of Appeals wholly failed to give any effect to the decision of this court in the Government suit upon the same issue and the same facts; that the proposed form of distribution was illegal and inequitable; that, under the circumstances presented in the record, the case fell within the established rule of courts of equity to preserve and maintain the existing condition of affairs whenever the questions of law or of fact to be ultimately determined are grave or difficult and the injury to the moving party would be immediate, certain and irreparable if the injunction were refused and the subject matter of the litigation dissipated; that the balance of convenience was immeasurably in favor of the granting of the motion in order to prevent the dissipation of the subject matter of the litigation within the rule heretofore uniformly recognized by all courts of equity;[1] that any possible damage to defendant could be covered by a bond, and that it would be in the highest degree unjust and

[1] *Russell* v. *Farley*, 105 U. S. 433, 438.

inequitable to permit the directors of the Northern Securities Company, pending the litigation, arbitrarily to decide in their own favor the merits of the controversy, defeat the whole object of the suit by distributing to third parties the stock involved and claimed by the complainants, and denude the company of ninety-nine per cent. of its assets.

The ruling of the majority of the Circuit Court of Appeals and the reversal of the injunction order in pursuance thereof practically disposed of the entire controversy as was, indeed, intended by the learned majority of the Court of Appeals, and as was expressly recognized in its opinion and in the dissenting opinion, and the decision left the complainants remediless and without a day in court, because, as is undisputed, the Northern Securities Company intends, as soon as the mandate of the Circuit Court of Appeals shall issue, immediately to dissipate the subject-matter of the litigation, to distribute the railroad shares among several thousand stockholders, and to denude itself of ninety-nine per cent. of its assets so as to be wholly unable to comply with any decree in this case if rendered in favor of your petitioners.

Your petitioners urge that the majority of the learned Circuit Court of Appeals erred—

1. In proceeding to a complete adjudication of the entire controversy on *ex parte* affidavits, in view of the admittedly proper exercise of discretion by the trial court.

2. In failing to give due effect to the decision of this

court in the Government suit upon the same question of ownership there presented upon the same proofs.

3. In holding that notwithstanding the Northern Securities Company had acquired and held the Northern Pacific shares in question under and in pursuance of an illegal combination and in violation of an act of Congress, it had nevertheless thereby become the full legal and equitable owner thereof, and was entitled to treat the illegal contract of acquisition as valid and to deal with the property according to the terms of such contract as if it had not been in violation of law.

4. In deciding that the intent of the parties to enter into a contract of purchase and sale was the only question involved in the case, and wholly disregarding the contention of the complainants that upon the discovery of the illegality of the enterprise and the consequent failure and abandonment of its purpose and object as a result of the decree in the Government suit, the vendors would be entitled to rescind the contract.

5. In holding that the plan of distribution was legal and equitable and not in violation of the rights of the complainants.

And your petitioners respectfully submit the following reasons why their petition should be granted and why this court should review the decision of the Circuit Court of Appeals.

I.

Your petitioners show that in the Government suit not only was the subject-matter of the litigation the

same as now involved, *i. e.*, the Northern Pacific shares claimed by your petitioners, but substantially the same facts were before this court from which the learned Court of Appeals now deduces the finding *as matter of law* that the acts of the parties resulted in vesting the absolute legal and equitable title to the railroad shares in the Northern Securities Company. They further show that the proposed plan of distribution is avowed to be "necessary" in order to comply with the decree in the Government suit;[1] that the issues tendered in both suits are in many respects the same; that the present complainants were identified in interest and in privity with the defendants in that suit; and that on the *same* issue in regard to the *same* railroad shares and on the *same* documentary evidence and facts, the court below now holds *as matter of law* that, notwithstanding the decision of this court and the conceded illegality of the contracts, the transaction nevertheless did amount to an absolute and unconditional purchase or investment.

Your petitioners show that the majority of the learned Circuit Court of Appeals, in ruling that the Northern Securities Company had become the absolute legal and equitable owner of the shares of stock of the Northern Pacific Railway Company held by it, declared as follows (opinion, pp. 14, 19):

> "If the question before us had been involved and decided in the suit of the *United States* v. *The Northern Securities Company*, or if it had been passed upon, though but incidentally, by the Supreme Court of the United States in disposing of the appeal in that case, we of course would not regard it as an open one. But it was

[1] Record, pp. 11, 193.

> neither decided nor considered at any stage of that litigation. . . . The present suit is an independent one, and as its subject-matter is distinctly different from that of the suit in which the United States was complainant, the duty of this court to independently consider it has seemed to us to be both plain and imperative."

Your petitioners respectfully submit that in the Government suit such question of ownership was not only presented for decision by the pleadings and proofs, the assignments of errors and the printed briefs and arguments in this court, as will appear by reference to the record and briefs on file in the office of the clerk of this court,[1] but that the very question was expressly passed upon by this court.

An examination of the record in the Government suit, in comparison with the record in the suit at bar, will show that the very resolution of the board of directors of the Securities Company of November 15, 1901, which is now referred to by the court below as establishing that the railroad shares were absolutely purchased, was submitted and urged in the Government suit as tending to establish the same fact of *absolute ownership*,[2] that the identical statement now contained in the affidavit of Mr. Hill was then testified to, in almost the precise words, by Mr. Clough, general counsel and a director of the Securities Company,[3] and that the testimony of Mr. Harriman, which is now regarded by the court below as establishing a sale and not a bailment, was also before this

[1] *Dimmick* v. *Tompkins*, 194 U. S. 540, 548.

[2] Record, Govt. suit, p. 190; present record, pp. 382–384.

[3] Record, Govt. suit, p. 758; present record, pp. 299, 333.

court in the prior case.[1] But, with all this evidence before this court and speaking of the contention that there had been a purchase or investment by the Securities Company, Mr. Justice Harlan said (193 U. S. at p. 353):

> "*This view is wholly fallacious, and does not comport with the actual transaction. There was no actual investment, in any substantial sense, by the Northern Securities Company in the stock of the two constituent companies. If it was, in form, such a transaction, it was not, in fact, one of that kind.*"

And Mr. Justice Brewer was speaking to the same point when he said (193 U. S. at p. 362):

> "*But no such investment by a single individual of his means is here presented.*"

Nevertheless, the Northern Securities Company, upon the rendition of the decision of this court in the prior suit, immediately again invoked the same facts and the laws of New Jersey and its certificate of incorporation for the purpose of establishing its power to acquire and hold the railroad shares, and proceeded to contend that it was the absolute owner of these stocks and as such owner entitled to distribute them to its stockholders as corporate assets. And the majority of the Circuit Court of Appeals has adopted the very contention on behalf of the Northern Securities Company which was unsuccessfully urged in this court in the Government suit on substantially the same facts, which contention Mr. Justice Harlan characterized as wholly fallacious and as not comporting with the actual trans-

[1] Record, Govt. suit, pp. 623, 901, 905; present record, pp. 248, 289, 293.

action, in which conclusion Mr. Justice Brewer apparently concurred.

Your petitioners further show that the petition of the United States in the Government suit expressly alleged among other things *in substantially the same language as the bill in the case at bar* (present record, p. 3; 193 U. S. 211) that—

> "The Northern Securities Company is a mere depositary, custodian, holder and trustee of the stocks of the Great Northern and the Northern Pacific Railway Companies, and its shares of stock are but beneficial certificates issued against said railroad stocks to designate the interest of the holders in the pool."

This averment was put at issue in the various answers in the Government suit by denials and allegations of absolute ownership (193 U. S. 227–228, 239, 241; present record, pp. 114, 125, 127). And the answer of the Securities Company averred that in acquiring shares of the Great Northern and Northern Pacific Railway Companies, it dealt solely with the separate owners of the shares in their respective individual capacities, and that "all the sales and transfers of the said stock to this defendant were absolute and without any reservation of any right or interest in any share thereof to the seller or to any other person" (193 U. S. 227–228), *being the very same contentions advanced in the case at bar and on substantially the same evidence.*

The briefs in the Government suit on file in the office of the clerk of this court show that the issue as to whether or not the Northern Securities Company had become the absolute owner of the railroad stocks was the most important of all the questions considered, and was

the basis of the discussion of the constitutional point presented. These briefs show that it was insisted in every conceivable form of argument that the Securities Company had derived the power to purchase these stocks from its incorporation under the laws of the state of New Jersey, that it held the stocks under valid contracts of absolute and unconditional purchase and sale, that its possession was that of absolute owner, that the original depositors had no longer any property interest therein, and that Congress had no power to regulate the exercise of the rights of ownership such as voting and collecting dividends. In the principal brief filed on behalf of the Northern Securities Company in this court, the following statements were made (pp. 82, 307):

> "The Securities Co. does not hold its railway shares as trustee, but as absolute owner. This is positively stated by Mr. Kennedy, I, 213; Mr. Morgan, I, 361; Mr. Hill, I, 699; Col. Clough, I, 788, 792, and is alleged as positively and directly in paragraphs VI and VIII of the petition, though in paragraph XI the Securities Co. is put into the before-mentioned inconsistent and incongruous positions of 'depositary, custodian, holder and trustee' of the same shares—as trustee, with the legal title, and custodian, with no title at all. And the decision seems to halt between the statement, in one place, that the Securities Co. is the owner of the shares it has acquired and the statement in another that it is a mere fictitious personage, and that the shares have merely been placed in its name by the real owners. Compare II, 1704-5 with II, 1706-7, 1708, and see pages 12, 13, 17, *supra*.
>
> "Being absolute owner of the shares it has acquired, the Securities Co. is free to sell (and, indeed, as Mr. Hill says—I, 699—'to burn'), all or any of its shares of

either railway company without selling any of its shares of the other. And the same absolute ownership and consequent absolute power of sale was of the essence of the original project of a company to hold only Great Northern stock. . . . The Securities Co. is the absolute owner of the shares held by it. The decision itself says as much (II, 1705). But the decree divests it, if not of the naked ownership, yet of every use and every profit and every incident of ownership. It may not vote the stock, nor exercise any of the powers or rights of ownership nor receive dividends nor dispose of the shares except as permitted in the decree. There is no difference in law between stripping one's property of everything that gives it utility or value and depriving one of the property altogether. It is true there is a permission, if not an invitation to the Securities Co. (an invitation of the royal kind, with all these injunctions in case of non-acceptance) to turn back its railway shares to their former owners in exchange for its own shares held by them—but not for cash; *the Securities Company may not sell the railway shares to others.*"

In the other briefs filed on behalf of the appellants in the Government suit, the claim was repeated again and again that the Northern Securities Company was an absolute *owner*, that the *ownership* of stock could not be regulated or controlled by Congress, and that the Circuit Court erred in not recognizing and giving effect to this *ownership*, to which all the parties in interest had testified.

The principal questions before this court in that suit were, first, whether or not the Securities Company had in legal effect become the absolute owner of the railway stocks, and as such entitled to exercise all the rights of ownership, and, secondly, if so, whether Congress had the constitutional power to prohibit the exercise of such

rights of ownership. The allegation in the Government's bill above quoted was, therefore, clearly a most material allegation, and speaking of it as of the other material allegations of the bill, Mr. Justice Harlan said (193 U. S. 325, 353):

> "*In our judgment, the evidence fully sustains the material allegations of the bill.* . . . Summarizing the principal facts, it is indisputable upon this record that under the leadership of the defendants Hill and Morgan the stockholders of the Great Northern and Northern Pacific Railway corporations, having competing and substantially parallel lines from the Great Lakes and the Mississippi River to the Pacific Ocean at Puget Sound, combined and conceived the scheme of organizing a corporation under the laws of New Jersey, which should *hold* the shares of the stock of the constituent companies, such shareholders, in lieu of their shares in those companies, to receive, upon an agreed basis of value, shares in the holding corporation; that pursuant to such combination the Northern Securities Company was organized as the holding corporation through which the scheme should be executed; and under that scheme such holding corporation has become the holder—*more properly speaking, the custodian*—of more than nine-tenths of the stock of the Northern Pacific, and more than three-fourths of the stock of the Great Northern, the stockholders of the companies who delivered their stock receiving upon the agreed basis shares of stock in the holding corporation. . . .
>
> "It was said in argument that the circumstances under which the Northern Securities Company obtained the stock of the constituent companies imported simply an investment in the stock of other corporations, a purchase of that stock; which investment or purchase, it is contended, was not forbidden by the charter of the company and could not be made illegal by any act of Congress. This view is wholly fallacious, and does not comport with the actual trans-

action. *There was no actual investment, in any substantial sense, by the Northern Securities Company in the stock of the two constituent companies. If it was, in form, such a transaction, it was not, in fact, one of that kind.* However that company may have acquired for itself any stock in the Great Northern and Northern Pacific Railway Companies, no matter how it obtained the means to do so, all the stock it held or acquired in the constituent companies was acquired and held to be used in suppressing competition between those companies. It came into existence only for that purpose. If any one had full knowledge of what was designed to be accomplished, and as to what was actually accomplished, by the combination in question, it was the defendant Morgan. In his testimony he was asked, 'Why put the stocks of *both* these [constituent companies] into one holding company?' He frankly answered: 'In the first place, this holding company was simply a question of *custodian*, because it had no other alliances.' That disclosed the actual nature of the transaction, which was only to organize the Northern Securities Company as a *holding* company, in whose hands, not as a real purchaser or absolute owner, but simply as custodian, were to be placed the stocks of the constituent companies—such custodian to represent the combination formed between the shareholders of the constituent companies, the direct and necessary effect of such combination being, as already indicated, to restrain and monopolize interstate commerce by suppressing or (to use the words of this court in *United States* v. *Joint Traffic Association*) 'smothering' competition between the lines of two railway carriers."

And Mr. Justice Brewer, addressing himself to the contention that the Northern Securities Company had purchased the railway shares by way of investment and paid therefor with its own stock, and that it had the constitutional right to be protected in the exercise of all

rights appurtenant to such absolute ownership, in his concurring opinion said (p. 362):

> "*But no such investment by a single individual of his means is here presented.* There was a combination by several individuals separately owning stock in two competing railroad companies to place the control of both in a single corporation. The purpose to combine and by combination destroy competition existed before the organization of the corporation, the Securities Company. That corporation, though nominally having a capital stock of $400,000,000, had no means of its own; $30,000 in cash was put into its treasury, but simply for the expenses of organization. The organizers might just as well have made the nominal stock a thousand millions as four hundred, and the corporation would have been no richer or poorer. A corporation, while by fiction of law recognized for some purposes as a person and for purposes of jurisdiction as a citizen, is not endowed with the inalienable rights of a natural person. It is an artificial person, created and existing only for the convenient transaction of business. *In this case it was a mere instrumentality by which separate railroad properties were combined under one control.* That combination is as direct a restraint of trade by destroying competition as the appointment of a committee to regulate rates. The prohibition of such a combination is not at all inconsistent with the right of an individual to purchase stock. *The transfer of stock to the Securities Company was a mere incident, the manner in which the combination* to destroy competition and thus unlawfully restrain trade *was carried out.*"

The above quoted extracts from the opinions of Justices Harlan and Brewer, when read in the light of the dissenting opinion, can leave no reasonable doubt that every member of the court understood that the question of *ownership* and the nature of the possession of the Northern Securities Company as

"a holding company" was one of the points presented for decision. The dissent was based, primarily, upon the conclusion of the four dissenting Justices that the transactions were what they purported to be, namely, lawful sales conferring full ownership, and that Congress had no power to regulate such acquisition of property or the exercise of the rights incident to such ownership. Thus, at page 366, Mr. Justice White used the following language:

> "It is said, first, that the mere exchange by the Northern Securities Company of its stock for stock in the railroads *did not make the Northern Securities Company the real owner of the stock in the railroads*, since the effect of the transaction was to cause the Securities Company to become merely the custodian or trustee of the stock in the railroads."

The dissent from this proposition accentuates it as the necessary basis of the decision of the court. The court having decided the first question, namely, that the Securities Company did not become the owner of the railway stocks, it became unnecessary to decide and the court did not decide whether Congress had power to prohibit the exercise of the rights of ownership.

In addition, the answers of the various defendants in the Government suit set up the constitutional right of such stockholders to sell their property as they saw fit, and pleaded that the act of Congress as construed and enforced by the court below was unconstitutional in that "persons may not be deprived of their property without due process of law, by taking from them the right to sell it as their interest may suggest" (transcript, pp. 126, 146, 156, 161, 171, 181; 193 U. S. 241,

246, 254, 255). It was in answer to this plea that Mr. Justice Harlan said that "the decree, if executed, will destroy, not the property interests of the original stockholders of the constituent companies, but the power of the holding corporation as the instrument of an illegal combination of which it was the master spirit, to do that which, if done, would restrain interstate and international commerce" (p. 357). And, as your petitioners respectfully submit, the learned majority in the court below quite misapprehended the point to which this part of Mr. Justice Harlan's opinion was directed.

Moreover, as your petitioners submit, when the decree in the Government suit expressly adjudged that *all* the railroad stock "*claimed to be owned* and held by the defendant, the Northern Securities Company, was acquired and is now held by it in virtue of such combination or conspiracy," etc. (193 U. S. at p. 255), and authorized the *return* and re-transfer of the stock to the original depositors or their assigns, the court in effect held that the United States was right in its contention in bill and argument and that the Securities Company had not become the *absolute owner* of the stocks, as was, on its part, contended. This resulted logically and necessarily from the adjudication that the transaction of acquisition and holding was for an illegal purpose in direct violation of an act of Congress, and that the company might return the stocks to the original owners. When the court decided that the company acquired possession and claimed to own the stocks by virtue of an illegal combination in direct violation of the statute and

authorized the return of the property, it was not called upon to go further and announce that the effect of such an adjudication of illegality was to recognize that the railroad stocks still belonged to the depositors as beneficial equitable owners or to reiterate the settled doctrine of this court that a contract in violation of a statute is wholly void and of no legal effect, that it cannot be the foundation of any right or power, "and that neither what has been done under it, nor the action of the court, can infuse any vitality into it" (118 U. S. 317).

Your petitioners submit that if this court had contemplated that, notwithstanding the finding in the decree in the Government suit that every share of railroad stock had been acquired and was held by virtue of an unlawful combination and under an illegal contract, nevertheless the absolute beneficial ownership had become fully vested in the Securities Company as a corporate asset as fully as if the contract were lawful and that the original depositors or their assigns were not the equitable or beneficial owners thereof, it would not have authorized the return or held that their rights were not affected by the decree. If the original depositors had no property interests other than as stockholders upon the failure of the object and purpose for which they transferred their property—if they were not entitled to the return of the deposited railroad stocks as owners thereof—if the absolute ownership had passed out of them to the Securities Company by virtue of the illegal contract, and the original depositors had nothing left but its certificates of stock, then, surely,

the destruction of the value of the railroad stocks in the hands of the Securities Company necessarily operated to destroy the value of the only interests remaining in the original stockholders. If all the property of a corporation be rendered worthless in its hands, the property interests of its stockholders are certainly destroyed. But if the conclusion of the court was that the absolute ownership had not been acquired by virtue of a transaction in violation of an act of Congress, that the purpose was illegal and the attempt void, and that, upon the utter failure of that purpose, the original depositors or their assigns were entitled to the return of their property, then the meaning and import of the express authorization to *return* and of the declaration that "the decree, if executed, will destroy, not the property interests of the original stockholders of the constituent companies," etc. (p. 357), becomes at once plain, logical and consistent. The provision in the decree expressly sanctioning the *return* and re-transfer of the very railroad stocks to the original depositors or their assigns was an adjudication that could have been grounded upon no other basis than that the shares belonged to them as equitable beneficial owners. Mr. Justice White so understood when he said (193 U. S. p. 373):

> "And yet the decree, whilst forbidding the use of the stock by the Northern Securities Company, *authorizes* its return to the alleged conspirators, and does not restrain them from exercising the control resulting *from the ownership*."

It is submitted that if, in the Government suit, this court or the Circuit Court of Minnesota had

not recognized that the real beneficial ownership of the railroad stocks was in such original depositors or their assigns, instead of in the Securities Company, it would not have authorized the company to return the stocks to them. How could the court have given such authorization if that was not the logical and legal consequence of its decision? How could any court conceive itself empowered to *authorize* or sanction a return of property to those who were not the owners thereof?

It is submitted that the language used by Mr. Justice Harlan, to that extent certainly concurred in by Mr. Justice Brewer, is utterly inconsistent with any other assumption than that the beneficial or equitable ownership of the railroad stocks remained in the original depositors as the necessary and logical result of the adjudication that the Northern Securities Company had acquired and held property as a mere "holding" company in violation of the act of Congress and could return the stocks to the original stockholders of the respective railway companies, because "no performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it" (Mr. Justice Gray in *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 60).

And your petitioners, therefore, respectfully submit that the learned court below clearly erred in holding that the question of ownership was not even incidentally passed upon by this court in the Government suit.

II.

Your petitioners further show that they established a *prima facie* case, even if the effect of the prior decision of this court in the Government suit be wholly disregarded whether as *res adjudicata* or as a controlling precedent upon the same group of facts.

Their verified bill of complaint alleged that the Northern Securities Company was organized in order to effectuate and accomplish the objects of an illegal combination adjudged to have been in violation of the act of Congress and in pursuance of an agreement among the promoters, including Mr. Hill and Mr. Clough, affiants in the case at bar, (present record, p. 3) viz.—

> "to organize a holding company under the laws of the state of New Jersey, and that said holding company should acquire and permanently hold a majority of the shares of the capital stock of said Great Northern and Northern Pacific Companies and control the operation and management thereof in perpetuity and that the then existing holders of such railway shares should deposit the same with said holding company and receive in lieu thereof share certificates of the said holding company upon the basis of $180 par value of its stock for each share of Great Northern stock and $115 par value of its stock for each share of Northern Pacific stock, and that said holding company should act as custodian, depositary, or trustee of said railway shares on behalf of the existing stockholders of said railway companies and their assigns."

These allegations are in substantially the same language as those contained in the bill of the United States in the Government suit and to be found in the opinion of Mr. Justice Harlan.

Your petitioners earnestly and particularly call the attention of this court to the fact that there was no denial of these verified allegations as to the purposes for which the Northern Securities Company was organized, in any form or manner whatever, although the president, the secretary and the transfer agent, all of whom are also directors of the company, volunteered *ex parte* affidavits. Indeed, the testimony of five directors (one-third of the whole board, and two of them, Mr. Hill and Mr. Clough, the president and general counsel, original promoters and defendants in the Government suit) was submitted in answer to the bill in the case at bar, but they were silent as to the terms of the combination in pursuance of which the company was organized, or as to the purposes and objects for which it was organized, or as to the nature of the intended holding of the railroad shares in the company's possession, and yet the court below entirely disregarded this material and pregnant condition of the record in determining contrary to the same that the Northern Securities Company was a purchaser and not a bailee.

The only proof submitted by the defendant Northern Securities Company on that branch of the case was the testimony of Mr. Clough in the Government suit and the *ex parte* affidavit of Mr. Hill, president of the company, to the effect that no contract, agreement or understanding in regard to the acquisition of the Northern Pacific shares in question was ever made or authorized by the company except as recited in the resolution of the 15th of November, 1901.[1] To repeat, this was

[1] Record, p. 333.

the very same resolution which was before the court in the Government suit, and the statement of Mr. Hill was merely a repetition of what Mr. Clough had testified to in the Government suit.[1] The affidavit of Mr. Hill did not controvert the allegations of the bill as to the terms and substance of the agreement to which he was alleged to have been a party and in pursuance of which the Northern Securities Company was organized.[2]

But, in addition to the failure to deny or controvert these fundamental allegations of the bill, which, upon an application of this kind, is equivalent to an admission of their truth,[3] your petitioners submit that the uncontradicted and uncontroverted proofs before the court below supported the allegations of the bill.

The proofs as to the intention to organize a "holding company" are as follows:

(*a.*) Uncontradicted allegation of verified bill (record, p. 3).

(*b.*) Uncontradicted affidavit of E. H. Harriman (record, p. 199).

(*c.*) Answer of Northern Securities Company in Government suit (193 U. S. at p. 233; present record, pp. 119 *et seq.*).

(*d.*) Answer of James J. Hill *et al.* in Government suit (193 U. S. at p. 241; present record, pp. 140 *et seq.*).

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[1] Present record, p. 299; testimony Clough, record in Govt. suit, p. 788; resolution, *ibid.*, p. 910.

[2] Present record, p. 333.

[3] *Young* v. *Grundy*, 6 Cr. 51; *Agawam Company* v. *Jordan*, 8 Wall. 583, 609; *Brown* v. *Pacific Mail Steamship Company*, 5 Blatchford, 525, 530, 532; *Christensen* v. *Kellogg Switchboard & Supply Co.*, 110 Ill. App. 61, 70.

(*e.*) Answer of J. P. Morgan *et al.* in Government suit (193 U. S. at p. 251; present record, p. 169).

(*f.*) Testimony of Mr. Hill, Mr. Morgan and Mr. Harriman, in Government suit (pp. 218, 221, 268, 290).

The proofs as to the intention to have the holding company *permanently* hold the shares of the railway companies and control their operation and management and not to act as a mere purchaser or investor were as follows:

(*a.*) Uncontradicted allegation of verified bill (record, p. 3).

(*b.*) Answer of James J. Hill *et al.* in Government suit (193 U. S. 234, 241; present record, pp. 140, 145):

"As far back as 1893, most of these gentlemen being well advanced and some far advanced in years, they began to discuss together what would be the effect upon the policy which under their influence the company had pursued with great benefit to its shareholders and the public, *should their holdings by death or otherwise become scattered, and by what means their holdings could be kept together, so as to secure the continuance of such policy in the management of the company.* It was considered that if a company should be formed to which they might transfer their individual holdings, their shares were likely to be held together, so long as the majority in the holding company should so wish, and this would tend to give stability to the policy of the Great Northern Company, be of aid to it in financial operations, and maintain the value of their investments. . . . The Securities Company, as now existing, became and is necessary as a defensive measure against attempts of rival interests to gain control of

the direction of one or both of defendant railway companies and defeat the great enterprise they had undertaken of establishing a large international and interstate traffic."

(*c.*) Answer of J. P. Morgan and Robert Bacon (latter being a director of the Securities Company) in Government suit (193 U. S. 251; present record, p. 169):

"For some years the defendant Hill and others who were interested in the Great Northern Company, but not including these defendants, had in contemplation the formation of a corporation for the purpose of purchasing their separate interests in that company, with *the general object that said interests should be held together and the policy and course of business of the Great Northern Company should be continuous in developing the company's system and the territory served by it, and not subject to radical change and possible inconsistency from time to time.* In or about August, 1901, as this plan was approaching maturity, *said parties* FOR SIMILAR REASONS determined that they would also sell to the new company, when formed, their interests in the Northern Pacific Company, which were considerable in amount, and that the capital of the new company should be made sufficiently large to enable it to purchase all shares of the Great Northern and Northern Pacific companies which the holders might desire to sell and any other shares which the new company might deem it advisable to acquire."

(*d.*) The testimony of Mr. Hill, Mr. Kennedy and Mr. Morgan in the Government suit. Thus Mr. Hill testified (present record, pp. 216, 217, 218):

"A. The action in buying the majority of the stock of the Northern Pacific in the market in April or May, or both, brought the question up more strongly than

before as to the necessity of the Great Northern old shareholders who had been continuously connected with the property from the beginning *making their holding together permanent*, and, I think, in June, somewhere about the 5th or 6th of June, speaking from recollection, Mr. Kennedy, on his return from Europe, discussed the matter with me, going over the entire situation, the relations of the Burlington; the relations growing out of the Burlington; the relations growing out of the large purchases by the Union Pacific interests of the Northern Pacific, and *suggested whether we should not include in our holding company our holdings in the Northern Pacific.*

Q. *And for the same purpose?*

A. *For the same purpose, so that we would all act together and no one would sell out or leave the others. We would all act together.*

Q. *For the purpose of unifying the interests that you had in the two roads?*

A. *Yes, sir; for the purpose of unifying the interests in each road;* because when the Burlington was transferred or sold to the Northern Pacific and the Great Northern jointly, our owning an equal share in the company, it was a matter of great consequence to the Great Northern as to who would own the stock of the Northern Pacific or control the Northern Pacific, and some of the shareholders—some of them are 86 years old, others are more than 80, and so on—they might have concluded that they would sell their stock, and it might have made a difference as to the majority of the common stock.

Q. Of the Northern Pacific?

A. Of the Northern Pacific, if the control of the Northern Pacific passed to the Union Pacific, as a matter of influence. . . . We wanted to put it in a corporation that was not a railroad company,—a company that would hold it as an investment, and the larger the company the more difficult it would be to secure a majority of it."

Mr. Kennedy testified (p. 219):

"Q. You wanted to have a majority of the stock of the Northern Pacific where you could absolutely control it?

A. Yes, sir.

Q. *Under all circumstances?*

A. *Under all circumstances.*"

Mr. Morgan testified (p. 221):

"Q. And then you had that in your own mind to have a *holding* company for the Northern Pacific?

A. That came up after I came back. When we found ourselves in this position, with the danger, having escaped as I thought at that time from what I thought was a great danger; that is to say, our property being absorbed by a competing line without our knowledge or consent, it occurred to me something ought to be done to prevent that, because, while we chose to defend the property, I did not want it to go on indefnitely, and I thought the best plan was to go to some trust company. *My idea was first to go to some trust company to take the Northern Pacific stock and hold it.*

Q. *That is to hold control?*

A. *Hold control of the stock.* JUST TO SURRENDER IT TO THEM AND TAKE THEIR RECEIPT.

Q. For the purpose of keeping control in one place?

A. No; not alone to keep it in one place, but *to keep it so that the policy of the company upon which its future depended could be continued.* We didn't want convulsions going on. You cannot take a company with three or four hundred millions of securities and do one thing one day and another thing another. It destroys confidence in the first place, and everything of that kind. *What I wanted to accomplish was to put that stock so that it could be protected—to maintain the policy of the company as it then existed.*"

Your petitioners submit that this testimony of their adversaries, wholly unexplained and unqualified by the defense, presented a *prima facie* case as to the pur-

poses and objects for which the Northern Securities Company was organized, particularly in view of the uncontradicted allegations of the verified bill. Your petitioners believed and assumed that if they thus submitted substantially the same evidence as was before this court in the Government suit and no qualification or explanation was vouchsafed by the defendants, the trial court would on such a motion regard the opinion of this court upon the identical question and evidence at least sufficient as a precedent to support a *prima facie* case and justify a preliminary injunction until the merits could be investigated on final hearing. And the trial court practically so held, without attempting to prejudge the merits by any expression of opinion until these gentlemen could be cross-examined and the proofs were ready for final submission.

There being no denial of the *fact* that a *holding* company was organized for the purposes testified to by the main promoters and that it was to permanently hold the railroad stocks and not dispose of them as an ordinary investor would be at liberty to do, the only remaining fact upon which the ruling of the majority of the Circuit Court of Appeals can possibly be sustained is that the parties persistently characterized the transaction as a *purchase* instead of a *deposit*.

The transaction in November, 1901, was undoubtedly put in the *form* of a contract of purchase and sale. The facts and surrounding circumstances, however, fixed the legal nature and effect of what the parties did and not the particular form they adopted or the

words they selected as expressing their object, view, or opinion. It may be conceded that Messrs. Hill, Morgan and associates characterized all the transactions as purchases on every occasion and in every record they made on their books, nevertheless, the courts are not blinded by mere forms or names nor thus prevented from dealing with the substance and reality of things. Evidently, Mr. Harriman at the time believed *as a matter of law* that the transaction constituted a sale, and so testified. Undoubtedly, Mr. Hill and Mr. Morgan used the word "purchase" or "exchange" and not "deposit" or "custody." But Mr. Harriman's opinion or testimony on such a point of law no more changed the nature of the transaction than did Mr. Hill's equally positive testimony in the Government suit as to the power of the Securities Company "to burn" the railroad shares (*supra*, p. 18). Indeed, if the form of the transaction—if mere names, or the language of the parties—if the recitals in all the documents could have changed the substance of the transaction, necessarily the result of the Government suit must have been different. But there, as here, and as in every case of this kind, the court has looked through the form and the phrasing of the parties, and has dealt with the substance and reality in seeking to determine the *truth*.

Moreover, *every word of Mr. Harriman's testimony was before this court in the Government suit.* The only new feature is his present affidavit, in which he candidly states that Mr. Morgan had said that the Securities Company would "purchase". A careful exam-

ination of his testimony and affidavit, however, will show that it contains nothing inconsistent with the present position as to the purposes and objects for which the Northern Securities Company was organized. The new affidavit should be read in connection with the verified bill. Mr. Harriman testified that he was acquainted with the basis upon which the company was to be organized (pp. 267, 292), and was generally cognizant of the plan of forming a securities or holding company (pp. 268, 293), and it is fair to assume that such plan was as testified to above. Among other things, he testified (pp. 293, 294):

"Q. The statement was made to me that they would put this Northern Pacific stock into a *holding* company and give us—not this Northern Pacific stock—but that they would *give us in part payment a holding company's stock* on the basis of $115 for Northern Pacific, and, if Great Northern were taken in, on the basis of $180 for Great Northern. They didn't state how much they were going to take in, or how little they were going to take in. Nor did I ask them to stipulate that they would not take any more than a certain amount or to agree to take a minimum amount. The statement was simply made that they were going to form a *holding* company, or had formed a *holding* company, and would pay us in this stock, and that those were the terms on which it was to be bought.

Q. Did they state to you that if they took in any other stock than what you would surrender to the holding company they would take it on the basis of $115 for the Northern Pacific and $180 for the Great Northern?

A. I don't think that statement was ever made. *It was a simple statement that they were going to* CHANGE *these shares of Northern Pacific and Great Northern on such a basis, and that they would make us part payment in that stock.* . . .

> All I remember is just as I have stated: A statement made to me that if this trade went through they would pay us in the shares of a holding company which would issue its stock *in exchange* for Northern Pacific at 115, and Great Northern at 180. And I agreed to take so much of that stock *in exchange* for the shares of the Northern Pacific we held—all the Northern Pacific we held."

It is true that Mr. Harriman also testified in the evidence before this court in the Government suit that the transaction was an unconditional purchase and sale, but this was only his opinion and understanding on a question of law and was not at all in conflict or inconsistent with his now stating the facts and letting the courts determine the legal effect. Is it not elementary law that the assertion of a *legal conclusion* under such circumstances never operates to estop a party from showing the real facts?[1] The proofs show that the words "pay", "payment", "purchase", "change", "exchange", were all used. Nevertheless, had Mr. Morgan's idea of making a trust company the depositary and using its *receipts* been adopted (*supra*, p. 34), instead of organizing a new company and using its certificates, or had individual trustees been selected to perform exactly the same function as the evidence in this record above quoted shows was to be performed by the *holding* company, the parties might well have used the very same words and have said that the trust company or the trustees would issue receipts in "payment" instead of "exchange," or that the trust company or trustees would "pay" depositors in

[1] *Sturm* v. *Boker*, 150 U. S. 312, 336; *Mutual Life Insurance Company* v. *Phinney*, 178 U. S. 327, 342, 343.

voting trust certificates; and yet the use of one word or phrase or another would not have affected the real nature of the transaction, or have transformed a deposit in trust into an absolute sale, or have operated to vest the absolute legal title in such custodians or depositaries, especially in view of the adjudged illegality of the transaction. This court has often pointed out, that although parties may industriously and repeatedly call a transaction what it is not, even in the most formal instruments, the words as well as the form or the name are indeed of little account and cannot obscure the truth, but that it is the legal effect of the whole transaction which is to be sought for and gathered from the acts of the parties.[1] In contemplation of law, the legal title did not pass and could not pass, whatever the intention of the parties may have been, because the whole scheme and every step in its accomplishment were in violation of a statute and hence null and void.

Your petitioners, likewise, submit that the majority of the court below was in error in assuming that the pledge by your petitioner, the Oregon Short Line Railroad Company, of the share certificates of the Northern Securities Company was in any way material upon the question of the nature and legal effect of the *holding* of the railroad stocks by the latter company. If such share certificates had on their face been in the form of mere receipts showing beneficial interests in a deposit in trust, or had there been voting trust certificates in

[1] *Heryford* v. *Davis*, 102 U. S. 235, 243, 244, 246; *Chicago Railway Co.* v. *Merchants' Bank*, 136 U. S. 269, 280; *McGourkey* v. *The Toledo & Ohio Ry.*, 146 U. S. 536, 569.

the usual form, or trust company's receipts, as Mr. Morgan originally planned (*supra*, p. 34), the pledge by the holder as owner of such receipts or certificates would manifestly not have changed the nature of the contract of holding or tended to convert a bailment into a sale, or estopped pledgor and pledgee as against the issuing company from showing the real transaction. Paraphrasing, with all deference, Mr. Justice Brewer's language, "the organizers might just as well have" issued receipts or voting trust certificates, and the nature of the proposed holding, as contemplated by them, would not have differed in the slightest degree from the form they actually adopted to effect their purpose. Obviously, the Oregon Short Line Company became the holder and owner of the certificates the same as if they had been mere receipts, which it could pledge, transfer and assign without in any way affecting or changing the contract which those certificates or receipts might evidence, as determined by the legal effect of what the parties did and sought to accomplish.

III.

Your petitioners further show that in the court below they contended that even though the contract was on its face one of purchase and sale, nevertheless, upon the ascertainment that the object and consideration of the contract must wholly fail by reason of adjudged illegality and the legal disability of the Northern Securities Company to hold the stocks in the manner and for the objects contemplated by the parties, any depositor was entitled

to rescind and claim his property upon the abandonment of the illegal enterprise by the company. The court below, however, wholly disregarded this contention and did not decide the question thus presented.

In support of this contention, it appeared by the verified bill of complaint that the complainants had acted in good faith in the full belief that the organization of the Northern Securities Company was not, and the acquisition and holding by it of the railway stocks would not be, in violation of any statute of the United States (p. 5); that it was under such belief that they refrained, pending the final determination of the suit brought by the United States, from taking any steps or instituting any proceedings for the protection of their rights in the premises (p. 5); that every person to whom the stock of the Northern Securities Company was issued, whether for shares of the railway companies or for cash, had full knowledge and information of the purposes for which the company was organized (p. 4); that the books of the Northern Securities Company would show for what purposes or consideration each outstanding certificate of stock had been issued (p. 13); that a large part of the stock of the Northern Securities Company was still held in the hands or on behalf of the original holders who exchanged the same for stock of the railway companies, and that wherever there had been any transfers of certificates to third parties, the origin of each and every outstanding certificate of stock of the Securities Company so transferred to third parties could be traced and shown in and by the records and books of the company

and thus fully traced and identified (p. 13). Nevertheless, the majority opinion in the court below wholly failed to consider the effect of these allegations and the affidavits in support thereof, although the trial court discussed them and commented on the conflicting affidavits as well as the evasive statements of the defense (p. 421).

Your petitioners earnestly submit that they are seeking to prove these allegations of their verified bill of complaint and thereupon to urge that, under such circumstances, they are entitled to rescind the contract and have a return of their original property, on the ground that the contract has wholly failed of its object, that the illegal enterprise is about to be abandoned by reason of the decree in the Government suit, and that their property is held without consideration. In support of their contention, your petitioners referred the court below among other numerous authorities to the opinion of Mr. Justice Matthews, speaking for this court in *Chapman* v. *County of Douglas*, 107 U. S. 348, 355, where the following language was used:

> "As the agreement between the parties has failed by reason of the legal disability of the county to perform its part, according to its conditions, the right of the vendor to rescind the contract and to a restitution of his title would seem to be as clear as it would be just, unless some valid reason to the contrary can be shown. As was said by this court in *Marsh* v. *Fulton County*, 10 Wall. 676, 684, and repeated in *Louisiana* v. *Wood*, 102 U. S. 294, 'the obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution

or compensation.' See also *Miltenberger* v. *Cooke*, 18 Wall. 421."

Yet the court below gave no consideration whatever to your petitioners' contention upon this and other points, holding, as appears by its opinion, that if the parties originally used the term "purchase" or intended a contract of purchase, whatever else might appear, that ended the controversy, notwithstanding the adjudged illegality of such contract of purchase and failure of consideration, and notwithstanding the consequent legal disability of the Securities Company to perform any of the obligations indisputably assumed by it.

IV.

Your petitioners further show that the proposed plan of distribution is in conflict with public interests and public policy, and that its probable effect will be to circumvent and defeat the intent and spirit of the decree of this court in the Government suit.

It is submitted, as a general proposition of law and public policy, that in the case of illegal trusts and combinations adjudged to be in violation of an act of Congress (particularly where, at the inception of any such enterprise, its legality is at once challenged by the National Government), justice and sound public policy will be promoted by restoring the *status quo*, and not permitting distribution on the basis of alleged rights acquired *as stockholders* under and by virtue of the illegal contract, so as primarily to put an end to the continued violation of the law, and secondarily to prevent any party from profiting or

benefiting by or through an illegal contract. Parties should not be permitted to enter into illegal trusts and combinations and hold property under illegal contracts, and, after their plans are stayed and adjudged illegal, proceed to effectuate the illegal contract of purchase to the extent of vesting title in themselves. Restore the *status quo* is all that the promoters of illegal combinations and trusts should be permitted to do. Such a rule would operate as a salutary restraint, and would deprive parties of any advantage or benefit from the unlawful acts. It would restore to each what he parted with, but deny him the right to any more. It would leave no inducement to transgress the law, and hold out no premium or profit to promoters in the formation of illegal trusts or combinations in defiance of law and inimical to the public welfare. And, as in the case at bar, it would prevent the responsible parties from being indemnified or rewarded for a violation of law.

It is submitted that this question is one of great public interest and far-reaching importance, and one likely to arise and recur constantly in connection with the dissolution of illegal combinations and trusts adjudged to be in violation of the act of Congress.

Your petitioners further show that the evil condition aimed at and sought to be eradicated by the decree in the Government suit, was the holding of the shares of two competitive railway companies "in one ownership." The vice was that such a control and ownership removed all motive, and deprived the public of all benefit, of competition in the management of the railroads. Obviously, also, if one individual or

a combination of individuals acting together are to hold a majority of the stock of two competing railroads as a result of an agreement, all incentive to competition would be removed as long as such holding continued, and any agreement which provided for, or contemplated, or brought about this result would be declared illegal, the same as the present form of combination.

Under the proposed plan of distribution, the stockholders of the Northern Securities Company will receive both kinds of stock, and as long as the majority continue to hold them, there will exist no more incentive to competition than existed while the stocks were held *for them* by the Securities Company. On the other hand, the restoration of the *status quo* would place both railway companies in a position where actual competition would be promoted. Moreover, on the *pro rata* distribution proposed, the control of a majority of the stock of both companies will probably be found vested in the very parties who, prior to the organization of the Securities Company, held Great Northern stock, and who, as Mr. Hill said in his testimony in the Government suit, would stand "without hitching" (record in Government suit, p. 62).[1]

The record shows that in 1901 Mr. Hill and his associates, then largely interested in the Great Northern Company, entered into the combination condemned by the courts for the purpose of suppressing competition between that company and the Northern Pacific Company. The railroad stocks were acquired in pursuance

[1] Record in Gov. suit, p. 62: "I said myself and friends would stand without hitching, and we did."

of that plan, and for no other purpose, and that purpose can only be defeated by completely undoing what was attempted and by separating the ownership and control of the two railways. If the original owners of Great Northern stocks, to whom a majority of the Securities Company's stock was concededly issued (viz., $211,057,600 out of a total issued capital of $395,400,000, pp. 4, 329), are now to receive a clear majority of both the Northern Pacific and the Great Northern stocks, as the plan proposes, Mr. Hill and his associates will accomplish the fundamental and essential feature of their unlawful scheme, for they will be securing and perpetuating the joint ownership, but under another form and name. The holders of a majority of Great Northern stock will then become the holders of a majority of Northern Pacific stock. *And this result, tending patently to prevent all competition, will be brought about through the medium and as a direct result of the illegal contract and in pretended compliance with the decree in the Government suit!* In other words, Mr. Hill will accomplish, through the medium of the present illegal contract, exactly what he was proceeding to do in 1895 until he was frustrated by the decision of this court in *Pearsall* v. *Great Northern Railway*, 161 U. S. 646, and exactly what he was proceeding to do in another form by means of the Northern Securities Company until he was frustrated by the decision of this court in the Government suit.

Your petitioners further show that although the stockholders of the Securities Company, who are to receive the railroad stocks when distributed, will be at liberty

to sell, they will appreciate that as long as they continue to hold both kinds of stock, the joint holdings will be much more valuable than any separate holding of only one kind of stock. The railroad stocks together are undoubtedly more valuable than the sum of the value of the separate stocks. The great body of stockholders will consult their pecuniary interests and retain both stocks, and, of course, boards of directors in the same interest will be continued. As Mr. Hill confidently asserts, they will all "stand without hitching," if he can only succeed in getting for them a majority of the stock of both companies. If they sell, the purchasers will want the joint holdings. It is possible to conceive of but two other schemes better calculated to effectuate and continue for many years the joint ownership and control in the same interest, and thus effectually remove all competition, and those are the schemes which were put an end to by the decisions of this court in the *Pearsall* case and in the Government suit.

Although one of the affidavits submitted by the Securities Company avers that Mr. Hill and those who were consulted in the formation of the Securities Company now hold only twenty-five per cent. of its stock (p. 324), the testimony was of an employee and was mere hearsay. Mr. Hill, who volunteered an affidavit, is silent on this point (p. 331). Mr. Clark, another affiant-director, is likewise silent (p. 334). So, also, is Mr. Terhune, another director (p. 341). How much stands in the names of others for the account of the original promoters does not appear. It is a well-known custom to register stock in the name of unknown and

obscure persons. Except by cross-examination of Mr. Hill and his associates, the complainants could not get at the exact truth, and all the facts ought to have been fully disclosed before the case was finally disposed of.

Your petitioners further show that, for all that the proofs disclose, ninety-nine (99) per cent. of the stock originally issued in exchange for Great Northern and Northern Pacific stock is still in the hands of original holders or held for their account. Although numerous transfers are shown, it does not appear that even one per cent. of that stock, which would amount to $4,000,000 par value, has been transferred to third parties ignorant of the illegal purpose. If one per cent., or more or less, has been transferred to third parties, it does not appear how much of that stock has become so commingled on the books of the Northern Securities Company as to be incapable of being traced. The great bulk of the stock has never changed hands, so far as the affidavits disclose.

Your petitioners, therefore, submit that they should have an opportunity to examine and cross-examine witnesses for the purpose of establishing the truth of their allegations and of enabling them to show that the proposed plan, instead of being in compliance with the decree in the Government suit and in itself equitable, is really in effect but a perpetuation of the illegal combination and unfair to your petitioners.

V.

Your petitioners further show that the learned majority of the Circuit Court of Appeals clearly erred in holding that the proposed plan of distribution was equitable because it was ratable, and they submit that if the exact result of such plan be appreciated, its want of equity will be at once manifest.

A majority of the stock of the Northern Securities Company, namely, $211,057,600 par value, was issued to Mr. Hill and the other original holders of Great Northern stock (pp. 4, 329). If the Great Northern stock is returned to them, they will get exactly what they put in, no more and no less, and will not profit or benefit by the illegal combination. If, however, they are to be entitled to over one-half of the Northern Pacific stock, they will secure a profit, *as the direct result of the illegal combination*, of $19,329,321. That is to say, the market value at $170 per share of the $118,124,200 par value Great Northern stock which they transferred is $200,811,140, whilst the market value of the Northern Pacific and Great Northern stock which they would receive on distribution *pro rata* ($82,882,319 par value of Northern Pacific stock at $135 and $63,676,077 par value of Great Northern stock at $170) would be $220,140,461, making a difference or profit of $19,329,321 resulting from the illegal combination, distributed among the promoters and original holders of the Great Northern stock or their assigns. On the other hand, the difference against the complainants, if we consider only the $71,732,062 of Northern

Pacific stock which the complainants have traced, will be $9,117,167.[1] Nevertheless, the Circuit Court of Appeals has now decided that the proposed division of these railway stocks "would effect a *ratable, and, therefore, equitable* division of them."[2]

There should also be appreciated the further fact that the Northern Pacific stock has paid in dividends 14 per cent. since November 18, 1901 (p. 201), that it is now paying at the rate of 7 per cent. per annum (p. 202), and that, so far as appears, the dividends on Northern Securities stock received by complainants are more than covered and offset by what the company has itself received on the Northern Pacific stock (p. 342).

The complainants traced and identified on the motion for an injunction at least $71,732,062 of the Northern Pacific stock which they originally owned or into which it was converted. They were offered, under the proposed plan, only $32,070,612 par value thereof, namely, forty-four per cent. of what they actually traced and identified, and instead of the remaining $39,661,450 of their Northern Pacific stock, they are offered and are to be compelled to take $24,638,919 par value of Great Northern stock. In order to maintain that the majority are to be thus entitled to deprive complainants of nearly sixty per cent. of their property and force them to take Great Northern stock against their will, the majority must necessarily assert some legal or equitable claim. Upon what legal or equitable principles are the holders of a majority of the

[1] Record, pp. 14, 416, 417.

[2] Opinion, p. 14.

Northern Securities Company's stock issued for Great Northern stock entitled to take for themselves nearly sixty per cent. of the Northern Pacific shares originally belonging to the Short Line Company? What legal or equitable right or claim can they possibly assert against the Short Line Company except under and by virtue of the illegal agreement? If they had sued to enforce distribution *pro rata*, could they have maintained their case except by grounding their claim on the illegal contract and insisting that they had acquired rights under and through that contract? Surely, the majority stockholders have no greater legal rights against the complainants than the Securities Company itself has, for they must necessarily claim under and through it.

Your petitioners submit that it is not legal or equitable that they should be compelled, as proposed by the defendant, to take $24,638,919 par value of stock of the Great Northern Railway Company, which they never owned, and thus be forced to become stockholders in that company against their will. They insist that if for any reason whatever the restoration of the *status quo* is impracticable, which they deny, then the only fair, ratable and equitable method, and the only method authorized by the laws of the state of New Jersey, is to sell all the railroad shares held by the Northern Securities Company, or such as may not be traceable, and distribute the proceeds ratably among the stockholders. *Mason* v. *Pewabic Mining Co.*, 133 U. S. 50, 63. They assert that the original holders of one company cannot against their will be forced to become stockholders in another company, and that any such scheme is in viola-

tion of the laws of New Jersey, as charged in their bill (p. 12). Unless by virtue of the existence of a statute at the time when the stockholders' rights were acquired or fixed, your petitioners submit that no stockholder in corporation A can be compelled against his assent to become a stockholder in corporation B. Such is the settled law of New Jersey. *Kean* v. *Johnson*, 1 Stockton, 401, 408, 409; *Coler* v. *Tacoma Railway & Power Co.*, 19 Dick. 117, 125, reversed on other points, 54 Atl. Rep. 413 (not yet officially reported).

Your petitioners further show that the affidavits before the court established no possible equity in favor of Mr. Hill and his associates as against the complainants, which would justify a court of equity in handing to the former one-fourth of the Northern Pacific stock claimed in this suit; that no equity can be suggested which would commend Mr. Hill and his associates to a court of equity or entitle them to indemnity at the expense of the complainants, and that if there be parties, more than any others, who ought to be prevented from profiting by the illegal combination condemned by this court, it is Mr. Hill and his associates. Yet, the substance of the defense below was that because some speculators in the market had bought into the situation pending the suit of the Government, and in defiance of the notice then served upon the whole world, some sort of an estoppel had arisen and that Mr. Hill and his associates were to be not merely indemnified but actually rewarded at the expense of the complainants, and to be enabled to force the complainants to give up most of the Northern Pacific stock belonging to

them, and to accept in lieu thereof Great Northern stock against their will.

Your petitioners further show that, as the bill avers, all the original holders of stock of the Northern Securities Company, whether issued in exchange for the railroad stocks or for cash, had full information of the purposes for which the company was organized (p. 4), and that as to this cash stock, it appeared that on January 22, 1903, nine months after the commencement of the Government suit, the board of directors of the Securities Company ratified the sale in the open market of 59,346 shares of its capital stock, and approved a contract with Mr. James J. Hill, its president, by which he had loaned some of his own stock for the purpose of making deliveries and that the board thereupon authorized "the issuance to Mr. Hill of 59,346 shares of the stock of this company to replace the said shares so sold" (p. 393; see also p. 329). It was not until after these sales had been made that the matter was disclosed to the board. But even if the Securities Company had actually sold 75,220 shares of its stock to third parties for cash, there was not the slightest proof that this cash stock could not be traced and identified as fully as if every certificate representing it were still in the hands of Mr. Hill, nor was there any proof that the Securities Company had not sufficient assets to return the full amount of cash and interest to any *bona fide* purchasers from the company for cash. On the contrary, the bill charges specifically that there are ample surplus assets to protect the rights of such

bona fide holders (p. 14), if any there be, and the Securities Company vouchsafed no answer to this positive allegation. The failure of the defendant to furnish the facts which it alone could furnish is commented on in the opinion of the Circuit Court (p. 421), and your petitioners relied upon the elementary rule of evidence that in such a case, it is to be taken as established against the silent defendant that, had disclosure been made, the facts would have been unfavorable to him. The absent proofs, which should be present before a final determination, could come only from the defendant Securities Company and the individuals who control it, and they saw fit not to disclose them.

But your petitioners submit that even if it were not the fact that the assets of the Securities Company remaining after the return to original depositors or their assigns of the deposited railroad stocks were sufficient to enable cash and interest to be repaid for the cash stock, the trial court could require the complainants to do equity and, if necessary, reimburse *bona fide* holders of the cash stock. The Circuit Court in its opinion recognized that this might be necessary (p. 422). The complainants are quite prepared to meet and adjust any equities found in favor of the holders of this cash stock, and in their bill they have offered to do so (p. 14).

Your petitioners respectfully submit that the possible equities of less than two per cent. in interest of the holders of the outstanding stock of the Northern Securities Company (probably less than one-third of one per cent. if we eliminate Mr. Hill's holdings of cash stock),

ought not to be permitted to affect and alter the legal rights of the great body of certificate holders who have no equities as against each other. The possible equities of the cash holders, *yet to be proved*, and in any event representing so small a percentage of the interests involved, ought not to control as to the relative rights and equities of the remaining holders, particularly in the absence of the facts as to the true situation of these cash holders.

Your petitioners further show that it was contended in the courts below that it was impossible to restore the *status quo* because of alleged inextricable confusion and insuperable difficulty in tracing the origin of the outstanding certificates on the books of the Northern Securities Company. As to this, the learned trial court said that the affidavits were conflicting (p. 422) and the learned Court of Appeals has not challenged the correctness of this statement.

But, as is known to every one, stock is only issued in the names of individuals or corporations. There is no such thing in this country as a bearer certificate of stock. Every corporation keeps a stock ledger and a list of stockholders. The laws of New Jersey require this corporation to do so.[1] In addition, a set of books is kept by the transfer agent and another set of books by the registrar of transfers.[2] There are two ledgers of the Securities Company relating separately to the Great Northern and Northern Pacific stock which it acquired and now holds "showing the original de-

[1] An Act concerning Corporations (Revision of 1896), § 33.

[2] Supplemental record, pp. 17–18.

posit of the stock of the said companies."[1] Through these books, every share of stock can be traced back to the original issue, because the books must show in the case of every new certificate exactly what old certificates have been surrendered. A stock ledger is always kept in the names of the individual stockholders. No other method is known to corporate bookkeeping. We have only to be given from the books the names of original holders to enable us to trace every share issued for Northern Pacific stock, and, after eliminating that part of the issue and the stock issued for cash, the remainder will be $211,057,600 issued for Great Northern shares (pp. 4, 329). If this latter has been broken up among ten thousand holders, still the problem would not be complicated thereby, for it is obviously a simple matter to divide the Great Northern stock among such holders of Northern Securities stock at the rate of issue, and thus return exactly what their Northern Securities shares originally represented and now represent—in other words, restore the *status quo* to the original holders or their assigns as authorized by the decree in the Government suit.

Your petitioners show that it was further contended below by the defendant Securities Company as an insuperable obstacle to restoration, that there were cases where the same individual turned in and exchanged both kinds of stock in one lot and received therefor certificates for Northern Securities stock. Mr. Kahn's affidavit, on behalf of complainants, indicated that there was only one such instance, and that related to Mr. Hill's

[1] Record, p. 232.

individual holdings (p. 232). The Securities Company controverted this (p. 341). The affidavits were conflicting. But, if we were to divide among the holders of certificates so issued for holdings of both kinds of stock exactly what was received in exchange for them, we would be restoring the *status quo*, or such commingled assets might be sold and the proceeds divided. This *would not, however, in either event be vesting title derived through the illegal transaction, as is proposed in the plan of pro rata distribution.* It would simply be treating the transferees exactly as we would treat the original party who had turned in both kinds of stock. The assignee would stand *pro tanto* in the shoes of his assignor, who was the original joint holder, as fully as if he had purchased an undivided part of the original joint holding or deposit of both kinds of stock. And the same remark applies to all the cases of commingling and confusion. After identification by those who can trace and show their property, which must represent the great bulk, what remained would necessarily belong to those whose certificates could not be traced, and would be divided among them, as it would be in the ordinary case of the commingling of any kind of property belonging to different owners for which receipts had been issued, *e. g.*, warehouse or grain elevator receipts.

Your petitioners earnestly submit that it would be a travesty of justice to permit any change or commingling by transfers *after the commencement of the Government suit*, and deliberately in the face of that serious litigation, to be a reason for now permitting a different dis-

tribution than if the status, as in the case of complainants, had been maintained in good faith during the pendency of the Government suit, so as not to circumvent or defeat the final decree.

VI.

Your petitioners further show that the learned majority of the Circuit Court of Appeals did not hold that the court of original jurisdiction had abused its discretion, but, on the contrary, the majority opinion admits that there was no such abuse of discretion and that the lower court "was justified in requiring that the *status quo* should be preserved and the subject matter of the controversy be withheld from dissipation until the judgment of this court could be obtained."[1] There was no claim that the verified bill of complaint failed to state a cause of action entitling the complainants to equitable relief; no one has yet ventured to suggest that the bill was demurrable; and the Securities Company has since filed an answer. Judge Bradford, sitting as Circuit Judge, held that the bill and affidavits submitted established a sufficient *prima facie* case, and, in the exercise of the discretion vested by law in the court of original jurisdiction, decided to grant the injunction and preserve the *status quo*, until there was opportunity, after full hearing, in the ordinary progress of the suit, to consider, with the deliberation they demanded, the questions of law and fact presented by the verified bill.[2] The majority of

[1] Opinion, p. 1.

[2] Opinion of Gray, C. J., dissenting, p. 20.

the Circuit Court of Appeals, however, ruled that, although there had been no abuse of discretion, nevertheless the defendant was entitled to invoke an immediate adjudication of the whole controversy on the merits. It is submitted that the majority of the court below erred in their understanding of the practice of courts of equity and of the province of an appellate court in the determination of appeals from injunction orders; that an appeal from such an interlocutory order is not a hearing on the merits but is a review of the exercise of discretion by the lower court, and that the settled rule is not to reverse orders granting preliminary injunctions except in cases of abuse of discretion.

Your petitioners show that since the act of Congress authorizing an appeal from an order granting an injunction (act of March 3, 1891, sec. 7, 26 Stat. 826, 828), the rule uniformly observed by the several Circuit Courts of Appeals has been that they are only justified in reversing orders of the Circuit Courts granting preliminary injunctions when the discretion of the latter has been improperly exercised or abused. In that respect, they have followed the long settled rule of equity procedure as to the province of appellate courts, a rule which has not before been gainsaid in any court of appeals, as will appear from the following cases:

Fourth circuit: *Rahley* v. *Columbia Phonograph Co.*, 122 Fed. Rep. 623, 625; *United States Gramaphone Co.* v. *Seaman*, 113 Fed. Rep. 745, 749.

Fifth circuit: *Railroad Commission of Texas* v. *J. Rosenbaum Grain Co.*, 130 Fed. Rep. 110, 111; *Massie* v. *Buck*, 128

Fed. Rep. 27, 31, 32; *Kerr* v. *City of New Orleans*, 126 Fed. Rep. 920, 924; *Workingmen's Amalgamated Council* v. *United States*, 57 Fed. Rep. 85, 86.

Sixth circuit: *Louisville Home Teleph. Co.* v. *Cumberland Teleph. & Teleg. Co.*, 111 Fed. Rep. 663, 667; *Loew Filter Co.* v. *German American Filter Co.*, 107 Fed. Rep. 949, 951; *Paris Medicine Co.* v. *W. H. Hill Co.*, 102 Fed. Rep, 148, 153; *Proctor & Gamble Co.* v. *Globe Refining Co.*, 92 Fed. Rep. 357, 359; *Société Anonyme* v. *Allen*, 90 Fed. Rep. 815, 818; *Thompson-Houston Electric Co.* v. *Ohio Brass Co.*, 80 Fed. Rep. 712, 730; *Garrett* v. *T. H. Garrett & Co.*, 78 Fed. Rep. 472, 477; *Thompson* v. *Nelson*, 71 Fed. Rep. 339, 341; *Duplex Printing Press Co.* v. *Campbell Printing Press Co.*, 69 Fed. Rep. 250, 252.

Seventh circuit: *New Albany Waterworks* v. *Louisville Banking Co.*, 122 Fed. Rep. 776, 782; *F. C. Austin Mfg. Co.* v. *American Wellworks*, 121 Fed. Rep. 76, 77; *Chickering* v. *Chickering & Sons*, 120 Fed. Rep. 69, 73; *Bartholomew* v. *Union Paper & Bag Co.*, 113 Fed. Rep. 289, 290; *City of Terre Haute* v. *Farmers Loan & Trust Co.*, 99 Fed. Rep. 838, 839; *Bradshaw* v. *Miners Bank*, 77 Fed. Rep. 932, 934.

Eighth Circuit: *Denver & R. G. Co.* v. *United States*, 124 Fed. Rep. 156, 160; *Stearns Roger Mfg. Co.* v. *Brown*, 114 Fed. Rep. 939, 941, 942; *Higginson* v. *Chicago, B. & Q. R. Co.*, 102 Fed. Rep. 197, 199; *Dimick* v. *Shaw*, 94 Fed. Rep. 266, 268; *City of Newton* v. *Levis*, 79 Fed. Rep. 715, 717.

Ninth Circuit: *Empire State, etc., Co.* v. *Bunker Hill, etc., Co.*, 121 Fed. Rep 973, 978; *Murray* v. *Bender*, 109 Fed. Rep. 585, 589; *Pacific Steam Whaling Co.* v. *Alaska Packers Assn.*, 100 Fed. Rep. 462, 463; *Southern Pac. R. Co.* v. *Earl*, 82 Fed. Rep. 690, 692.

Not only was this firmly established rule as to the province of appellate courts disregarded in the case at bar, but a new practice seems to be suggested, namely, that the trial court may properly grant an injunction and preserve the *status quo* without deciding the merits, "with the understanding that the defendant below would be entitled to invoke a complete adjudica-

tion of the entire controversy by " the appellate court.[1] This is not such a case as *Smith* v. *Vulcan Iron Works*, 165 U. S. 518, 524, in which the court was speaking of situations where under no aspect of the bill or any possible amendment or suggested proofs could the complainants recover. The subsequent case of *Mast, Foos & Co.* v. *Stover Mfg. Co.*, 177 U. S. 485, 494, clearly recognizes that if the bill be good on its face or capable " of remedy by amendment," or if " suggestion be made of further proofs upon the subject," as in the case at bar, the appellate court ought not to dismiss the bill.

It is respectfully submitted that no such procedure is sanctioned by the statute or the settled rules of courts of equity, and that such a rule would give a defendant an unfair and unwarranted advantage and completely overturn the fundamental principles upon which courts have heretofore proceeded in granting preliminary injunctions. As Mr. Chief Justice Fuller said in *Brill* v. *Peckham Motor Truck Co.*, 189 U. S. 57, 63:

> " The difficulty is, however, that the issue was only tendered on the preliminary application, and the hearing was not in itself a final hearing. If complainants in every case must understand that a motion for preliminary injunction requires the same showing as on a final hearing, very few motions of that sort would be made."

In the case at bar, the complainants earnestly prayed for the opportunity of proving their case as tendered in their verified bill, according to the ordinary procedure of courts of equity, which affords litigants presenting a serious controversy the benefit of their day in

[1] Opinion, p. 2.

court on final hearing. Two judges have held that they presented a *prima facie* case. On a hearing, the complainants would have had the opportunity to cross-examine Mr. James J. Hill and the other officers of the Northern Securities Company who, on the motion, were mere *ex parte* witnesses; they could have shown that the recitals in the resolution of the board of directors of the Securities Company and the persistent use of the word "purchase" did not comport with the legal effect of the transaction; they could have submitted all the circumstances surrounding the organization of the Securities Company and their ability to trace and identify the railroad shares received not only from the complainants but from Messrs. Hill and Morgan and their associates, and they could have established that it would be inequitable to allow Messrs. Hill, Morgan and associates to divide among themselves a large part of the complainants' Northern Pacific stock and perpetuate the combination by holding in "associated" hands a majority of the stock of these two competing railroad companies and thus practically nullify the intent of the decree in the Government suit with which the latter were professing to comply.

Your petitioners respectfully submit that it was unwarranted by any rule of equity procedure to hold that the court of original jurisdiction need not pass upon the merits in such a case and that a defendant, without demurrer or answer, or any other adequate defense than *ex parte* statements, would, in the appellate court, be "entitled to invoke a complete adjudication of the entire controversy." In criticism of this new practice,

Circuit Judge Gray used the following language (opinion, p. 21):

> "That there was no such abuse of discretion in this case by the learned judge of the court below, will, I think, be apparent from his own statement, and from the admission made to that effect by the majority of the court. It seems to me clear that he should be afforded the untrammeled opportunity he sought for a full hearing and deliberate investigation of what he had stated to be the important and doubtful questions of law and fact presented by this record. Such a course would be consonant with the genius of our judicial system, by not depriving the parties or a reviewing court of the benefit to result from the examination and judgment of a court of first instance. This salutary feature of our system would be measurably lost, if the right to appeal from an interlocutory decree for a special injunction, given by the Act of Congress, should be so construed as to allow courts of first instance to refer, and the appellate courts to assume, the determination of questions arising on motions for such injunctions. I cannot accept the view of the majority of the court, that it is our duty in the case at bar to do more than conform to what seems to me the established rule of appellate courts, and merely determine whether the sound judicial discretion of the court below has or has not been abused, declining to consider what ought to be the decision on the merits at final hearing. I think that we can conform to this general rule, 'without in effect renouncing the appellate jurisdiction conferred upon us by Congress.'"

This view of the learned dissenting judge as to the province and duty of the appellate tribunal entirely coincides with the views of this court in analogous cases where attempts have heretofore been made, as here, to induce the court to assume the determination of the whole controversy without a proper adjudication by the court of first instance. In the language of Mr.

Chief Justice Taney in *Webster* v. *Cooper*, 10 How. 54, 55:

> "This court has frequently said that this practice is irregular, and would, if sanctioned, convert this court into one of original jurisdiction in questions of law, instead of being, as the Constitution intended it to be, an appellate court to revise the decisions of inferior tribunals. Indeed, it would impose upon it the duty of deciding in the first instance, not only the questions of law which properly belonged to the case, but also questions merely hypothetical and speculative, and which might or might not arise, as previous questions were ruled the one way or the other."

This language was quoted with approval by the late Mr. Justice Gray in *Jewell* v. *Knight*, 123 U. S. 426, 433. See also *Chicago, Milwaukee, &c., Ry.* v. *Tompkins*, 176 U. S. 167, 179–180.

The Circuit Court of Appeals professed to and did proceed to "a complete adjudication of the entire controversy," and "determined the same upon the merits without further delay." It is respectfully but earnestly submitted that a compulsory hearing of a cause in equity upon the merits, not upon proofs taken in the orderly and usual way but upon *ex parte* affidavits filed by the defendant controverting the allegations of the bill, is too obviously irregular and unjust to be allowed to pass into a precedent, and ought not to be sanctioned.

In the case now at bar, the Circuit Court, although satisfied that a *prima facie* case was presented, made no final decision on the merits. It considered that the cause was not ripe for final decision. It confined itself to determining the question whether an injunction should or should not be granted. Two mem-

bers of the Circuit Court of Appeals, however, proceeded to a complete determination of the controversy on the merits. The third member of the court dissented on the ground that the Circuit Court had properly exercised its discretion. The decision, therefore, of the two judges constituting the majority of the Circuit Court of Appeals, is the first and so far the only decision on the merits; and if this writ of certiorari be denied, the case at bar will be finally disposed of without giving to the complainants the benefit of any action on the merits by the court of original jurisdiction or of any appellate review or the exercise of any appellate jurisdiction. Your petitioners submit that in a cause involving the Interstate commerce clause of the Constitution, the Anti-trust Act of Congress, the meaning and effect of the decision of this court in the Government suit, and the vast interests, public and private, which are involved, it was not fitting or proper that there should have been a final determination of the cause on the present record without a hearing on pleadings and proofs according to the settled procedure of courts of equity.

Conclusion.

Your petitioners humbly conceive that it is eminently fit, proper and just that this Honorable Court should review the action of the Circuit Court of Appeals in the case at bar and itself determine the meaning and effect of its own adjudication, the legal and equitable

rights of the parties upon the dissolution of trusts and combinations adjudged by this court to have been created in violation of an act of Congress, and the province of the several Circuit Courts of Appeals on appeals from interlocutory orders granting injunctions.

The jurisdiction of this court to issue the writ of certiorari in the present case is not open to dispute. Under the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 826, the power of this court extends to every case pending in a Circuit Court of Appeals and may be exercised at any time during such pendency, provided the case is one which but for this provision of the statute would be finally determined in that court, and this power is coextensive with all possible necessities and sufficient to secure to this court a final control over the litigation in all these courts of appeal. *American Construction Co.* v. *Jacksonville Railway*, 148 U. S. 372, 384; *Forsyth* v. *Hammond*, 166 U. S. 506, 514.

It is submitted that, under the circumstances of the case at bar, a writ of certiorari to review the decree of the Circuit Court of Appeals "is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the case," and comes within the class of cases contemplated by the court in the opinion delivered by the late Mr. Justice Gray in the former of the above cited cases; and that the questions are also of such importance as to bring the case within the classes mentioned by Mr. Justice Brewer in the latter case.

A certified copy of the entire record of the case in

the Circuit Court of Appeals is presented herewith, as required by rule 37, together with nine printed copies, and a copy of this petition together with due notice of presentation has been served on the counsel for the respondent.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said suit in equity therein entitled Northern Securities Company, appellant, *versus* Edward H. Harriman, Winslow S. Pierce, Oregon Short Line Railroad Company and The Equitable Trust Company of New York, respondents, to the end that the said case may be reviewed and determined by this court as provided in section 6 of the act of Congress, entitled "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891, 26 Stat. 826, and that your petitioners may have such other or further relief or remedy in the premises as to this court may seem appropriate and just and in conformity with the said act, and that the judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioners as in duty bound will ever pray, etc.

Dated January 14, 1905.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE,
OREGON SHORT LINE RAILROAD COMPANY,
by W. D. CORNISH,
Vice-President,
THE EQUITABLE TRUST COMPANY OF NEW YORK,
by LAWRENCE L. GILLESPIE,
Vice-President,
Petitioners.

Certificate of Counsel.

The undersigned members of the bar of this Honorable Court and of counsel for the petitioners in the courts below, hereby certify that they have examined the foregoing petition, and that in their opinion the same is well founded, and they respectfully submit that the cause is one in which the prayer of the petition should be granted by the court.

John F. Dillon,
D. T. Watson,
R. V. Lindabury,
William D. Guthrie,
R. S. Lovett,
Maxwell Evarts,
Bainbridge Colby,

Of counsel for petitioners.